CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 320

DANIEL O'DONNELL, PETITIONER,

vs.

GREAT LAKES DREDGE AND DOCK COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 20, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

DANIEL O'DONNELL, PETITIONER,

vs.

GREAT LAKES DREDGE AND DOCK COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 6, 1942.

—1560

Record from D. C. U. S., Northern Illinois—Continued

[fols. 1-3] [Caption omitted]

[fol. 4]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 3172

Civil Action

DANIEL O'DONNELL, Plaintiff,

vs.

GREAT LAKES DREDGE AND DOCK COMPANY, a Corporation, Defendant

(Action Under Special Rule for Seamen to Sue Without Security and Pre-Payment of Fees)

COMPLAINT—Filed July 1, 1941

Plaintiff by his attorney, Earl J. Walker, complaining of the defendant, respectfully alleges:

1. Upon information and belief that at all times hereinafter mentioned, the above named defendant was and now is a foreign corporation, organized and existing under and by virtue of the laws of the State of Delaware, with an office for the transaction of business in the city of Chicago and state of Illinois.

2. Upon information and belief that at all the times hereinafter mentioned, the above named defendant owned or leased a certain steamship known as the "Michigan."

3. Upon information and belief that at all the times hereinafter mentioned, the above named defendant operated said steamship.

[fol. 5] 4. Upon information and belief that at all the times hereinafter mentioned, the above named plaintiff, a citizen and resident of the state of Illinois, was in the employ of the defendant on board the steamship "Michigan" and for mary months prior to August 8, 1940, had been a member of the crew and employed thereon as a seaman, at

the rate of wages of Nine- Five Dollars ($95.00) per month, together with overtime and subsistence.

5. Plaintiff further avers on information and belief that on said day and prior thereto, that the said defendant was engaged in the performance of a certain contract with the Chicago Park District or other municipality, to transport sand from Indiana waters of Lake Michigan to navigable waters of said lake in Illinois, where said sand was unloaded by said defendant, and that the said plaintiff had at all times on and prior to said date been employed as a deckhand upon said vessel in the furtherance of said Interstate Commerce, and plaintiff's duties did directly or closely and substantially effect such commerce as hereinabove set forth; and plaintiff says that the said defendant, in the performance of its said contract and while engaged in said commerce, did, as part of the equipment of said boat, construct, own and maintain divers sluices and metal tubing located and used upon said vessel whereby said sand was sucked from the bottom of said lake into the hatches of said vessel, and later discharged therefrom through said tubing into certain other tubes or pipes upon the shore; and that said defendant had provided, used and maintained a certain gasket of great size and weight, for the purpose of connect-
[fol. 6] ing said tubing used on said "Michigan" with the pipes upon the shore or piling adjacent or alongside said vessel.

6. Upon information and belief, plaintiff says it was the duty of the defendant to provide him with a safe and seaworthy vessel and appliances, and to keep the same in a safe condition; to furnish plaintiff with a safe place in which to work; to furnish him with reasonably safe and seaworthy tools and appliances and keep the same in a safe condition; to furnish plaintiff with a sufficient number of competent co-employees and superior officers; to promulgate and enforce proper and safe rules for the safe conduct of said work, and to perform the same in a reasonably safe manner so far as the plaintiff was concerned; and to warn the plaintiff of dangers arising and to be encountered therein. Plaintiff says that on the day aforesaid, to-wit, August 8, 1940, the plaintiff was engaged upon the deck of said vessel in his usual duties, and while employed on said vessel as aforesaid, the gasket attached to the said tubing on the side of said vessel became loose or disengaged

and permitted large quantities of said sand and water being unloaded from said vessel to escape; and thereupon said defendant, through its Master employed by it and in charge of the said vessel and said employees, did order and direct said plaintiff to proceed to a staging on the side of said vessel and with other employees to readjust and refasten said gasket; and by reason of the negligent failure of the defendant, its agents, servants and employees, and each of them, to perform the foregoing duties, and each of them, on or about said date, and at the place aforesaid, and while [fol. 7] the plaintiff was engaged in the course of his employment by said defendant and under the orders and directions of said Master, and while working for a few minutes only on a staging over the side of said vessel, a counter-weight or lever upon said gasket, of great weight, suddenly and without warning to said plaintiff, fell down to and upon said plaintiff and he thereby sustained severe and painful personal injuries.

7. Upon information and belief plaintiff says that said injuries were directly caused by the negligence of the defendant, its agents, servants and employees, in that they failed and neglected to supply the plaintiff with a safe place in which to work; while employed in furtherance of interstate commerce or in the work closely or substantially affecting such commerce, failed to supply plaintiff with a sufficient number of competent co-employees and superior officers supplied were negligent; that said defendant failed to properly instruct the plaintiff in the course of his duties, and failed to properly superintend and supervise the work going on at the time plaintiff was injured; and failed to promulgate and enforce proper and safe rules or methods for the safe conduct of said work, and to warn the plaintiff of the impending dangers.

8. Upon information and belief, plaintiff says that by effect and virtue of Section 33 of the Merchant Seaman's Act of June 5, 1920, amending Section 20 of the Seaman's Act of March 4, 1915, whereby all statutes heretofore enacted in favor of railroad employees engaged in foreign or Interstate Commerce, and particularly as amended August 11, 1939, commonly known as the Employers Liability Act, were made applicable to seamen employed on [fol. 8] vessels in navigable waters of the United States, the plaintiff is entitled to recover damages from the negli-

gence of the defendant and its co-employees, or said Master, in the defendant's services.

9. Plaintiff says that he was thereby rendered sick, sore, lame and disabled, and was confined to the house for a long time, has been and will for sometime to come be prevented from working at his usual business and employment, and has lost and will lose large sums of money which he otherwise would have earned; has suffered and will suffer great pain, and has incurred and will as he is informed and believes, have to pay out further sums for medical and surgical attentions and medicines; and he thereby suffered great pain in body and mind for a long period of time, to-wit, from thence hitherto, and has thereby lost divers wages which he might and otherwise would have received; and upon information and belief, that he has been permanently injured, all to his damage in the sum of Five Thousand Dollars ($5,000.00).

10. Upon information and belief, plaintiff says that said injuries were not caused by any fault or want of care on the part of the plaintiff, but wholly and solely by reason of the dangerous, defective and unseaworthy condition of the vessel, and her appliances, and the negligence of the defendant, its agents, servants or employees.

11. Plaintiff says upon information and belief, that the said steamship "Michigan" was an American vessel, and the plaintiff had become and was on the day aforesaid and prior thereto, a member of the crew of said steamship in American waters.

[fol. 9] II.

And for a second, separate or distinct cause of action, plaintiff further alleges:

12. Plaintiff repeats and realleges each and every allegation hereabove stated, with the same force and effect as if the same were herein again set forth in full.

13. Upon the plaintiff's becoming injured and ill as aforesaid, it was the duty of the defendant to provide the plaintiff with his maintenance during his period of disability.

14. That said defendant has failed, neglected and refused to pay him the expenses of his maintenance while in-

capacitated, and upon information and belief that plaintiff was and will be incapacitated for a long period of time, and that the said expense of his maintenance by reason of his said injuries received while employed as aforesaid, that he will be incapacitated for a long period of time; and that said expenses of his maintenance amount to the sum of Five Thousand Dollars ($5,000.00), no part of which has been paid although duly demanded.

III

And for a third, separate or distinct cause of action, plaintiff alleges:

15. Plaintiff repeats and realleges each and every allegation hereinbefore stated, with the same force and effect as if the same were herein again set forth in full.

16. Upon the plaintiff's becoming injured and ill as aforesaid, it was the duty of the defendant to provide the plaintiff with proper and ordinary care, attention and treatment, and with proper and ordinary medical care, physicians and hospital treatment.

[fols. 10-11] 17. That the defendant, its agents, servants and employees, failed, neglected and refused to furnish the plaintiff with proper and ordinary care, attention and treatment, and with proper and ordinary medical care, physicians and hospital treatment; and in addition thereto was forced and compelled to work while he was sick, ill and unable to work, whereby his illness and injury was aggravated, and he was caused to sustain additional pain and suffering, all to his damage in the sum of Five Thousand Dollars ($5,000.00).

Wherefore, plaintiff demands a judgment against the defendant in the sum of Fifteen Thousand Dollars ($15,000.00), together with the costs and disbursements of this action.

Daniel O'Donnell, Plaintiff.

Earl J. Walker, 30 N. LaSalle—Randolph 6673, Attorney for Plaintiff.

Duly sworn to by Daniel O'Donnell. Jurat omitted in printing.

[fols. 12-14] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed July 30, 1941

Now comes the defendant, Great Lakes Dredge and Dock Company, a Corporation, by B. S. Quigley, its attorney, and moves the Court for an Order dismissing the above cause:

(1) for want of jurisdiction of the subject matter; and

(2) for failure to state a claim upon which relief can be granted.

B. S. Quigley, Attorney for Defendant.

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

Statement of Evidence—Filed January 19, 1942

RECITAL RE MOTION TO DISMISS AND ORDER SUSTAINING MOTION AS TO COUNT I

Be it remembered that heretofore, to-wit, on September 24, 1941, said cause came on for hearing upon the written motion heretofore filed by the defendant to dismiss the above entitled cause: (1) for want of jurisdiction of the subject matter, and (2) for failure to state a claim upon which relief can be granted, and for cause thereof the said defendant contended as follows, viz.: That the complaint fails to state a claim upon which relief can be granted for it appears on the face of said complaint and the allegations therein contained that plaintiff's injuries occurred while he was off of the Steamship Michigan under orders of his superior officer to repair a gasket on a staging along [fol. 16] the side of the vessel when said accidental injuries were sustained; that the Seaman's Act of 1915 (Section 33 of the Merchant Marine Act of 1920, amending Section 20 of the Act of 1915) applies only to causes of action arising under the marine law where admiralty jurisdiction was formerly invoked but only in so far as the procedure and determination of liability is concerned; that the jurisdictional question as to the right of the seaman to bring the

action at all remains the same, that is, whether the injury occurred under circumstances raising admiralty jurisdiction and is to be decided by the law of maritime; that in order to invoke admiralty jurisdiction, such injury must have occurred on the vessel, and injuries off the vessel and on land do not come under the admiralty law, and that plaintiff's remedy, if any, lies under the Workmen's Compensation Act of the state of Illinois; that while the accidental injury of which plaintiff complains was sustained while he was not aboard the Michigan, it follows that the District Court of the United States does not have jurisdiction to entertain this case. Plaintiff cannot seek redress under the law of maritime for want of jurisdiction thereunder; that he cannot proceed herein as at common law be- [fols. 17-18]. cause the state of Illinois has removed that right and substituted the Workmen's Compensation Act for his benefit, wherefore defendant respectfully submits that the within action ought to be dismissed for want of jurisdiction and that plaintiff ought to seek his remedy under the appropriate tribunal of the state of Illinois.

And thereupon said cause was argued by counsel for the respective parties; and thereafter, it was ordered by the court that said defendant's motion to dismiss said cause of action for want of jurisdiction be and said motion is sustained as to Count I, but was overruled as to Counts II and III of the complaint heretofore filed herein, to which action of the court in entering said order the said plaintiff duly objected.

[fols. 19-52] Colloquy Between Court and Counsel

The Clerk: O'Donnell vs. Great Lakes Dredge and Dock Company.

The Court: You may proceed.

Mr. D'Isa: If the Court please, before we proceed with the evidence, may I make this statement: There is no answer on file, so for the record may I have it shown that the only contest is to the nature and extent of the man's disability. We admit he is a seaman and he was injured, but we deny that he was injured to the extent which they claim.

(Witnesses duly sworn by the Clerk of the Court.)

The Court: Proceed.

. . . . . .

[fol. 53] In United States District Court

[Title omitted]

Plaintiff's Proposed Finding of Fact and Conclusion of Law—Submitted November 5, 1941

The court finds that the evidence herein tends to prove that the respondent as owner of the Steamship Michigan was operating the same and was engaged in interstate commerce and upon navigable waters, and that part of the duties of Daniel O'Donnell, during his employment as a deckhand on said steamship and on the day of his injury herein, were in furtherance of such commerce and directly or closely and substantially affected such commerce.

[fol. 54] Conclusion of Law

The court holds as a matter of law that the evidence herein tends to prove a cause of action under Section 20 of the Merchant Marine Act (46 U. S. C. A., Section 688) and under the Employers Liability Act, as amended in 1939 (45 U. S. C. A., Sections 51 to 58 inclusive) incorporated by reference as a part of said Merchant Marine Act.

In United States District Court

[Title omitted]

Plaintiff's Proposed Findings of Fact and Conclusion of Law—Submitted November 5, 1941

In this cause the libellant, Daniel O'Donnell, a seaman and member of the crew of the Steamship Michigan owned and operated by the respondent herein, Great Lakes Dredge and Dock Company, seeks to recover wages and maintenance from the respondent for injuries sustained by said libellant in the course of his employment and in the course of his duties as an employee as aforesaid. From the evidence herein, the court finds the following:

[fol. 55] 1. The respondent herein, the Great Lakes Dredge and Dock Company, a corporation, on August 8, 1940, and prior thereto, was the owner of the Steamship Michigan and was engaged in transporting cargoes of sand from Indiana

waters to Lincoln Park, in Illinois, over the waters of Lake Michigan, being navigable waters of the United States.

2. That respondent employed a crew of thirty-four seamen, including the libellant Daniel O'Donnell, who was a deckhand and member of the crew on said vessel under a contract for wages at Ninety Five Dollars ($95.00) per month and in addition thereto his keep amounting to One Dollar and Forty Cents ($1.40) per day.

3. That on August 8, 1940, the plaintiff was directed by his captain in command of said vessel to leave his usual duties and assist temporarily on shore in the repair of a gasket attached to said vessel, and while assisting in said repairs as directed by said captain, he was injured, due to the acts of other employees in removing certain wedges on the gasket, permitting a heavy portion thereof to fall upon him.

4. That plaintiff's physical injuries incapacitated him from labor as a seaman and other gainful employment for a period of ten months.

5. That by reason of his employment by respondent as aforesaid, and his injuries in respondent's service, the [fol. 56] libellant has sustained damages from loss of wages and keep during the period of his disability in the sum of Twelve Hundred Fifty Dollars ($1,250.00).

Conclusion of Law

The court holds as a conclusion of law herein that the respondent is liable for damages sustained by Daniel O'Donnell as aforesaid.

Held:

——, Judge

In United States District Court

Order Denying Plaintiff's Proposed Findings of Fact and Conclusions of Law—November 5, 1941

But the court denied said motion and refused to mark said findings of fact as "found" or said conclusions of law as "held," to which action of the court the plaintiff herein duly objected as to each of the same.

[fol. 57] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

Findings of Fact and Conclusions of Law—December 1, 1941

This cause coming on to be heard upon the libelant's libel, the answer of the respondent thereto, and the evidence heard, and the Court having heard the arguments of counsel and being fully advised in the premises, now makes the following

FINDINGS OF FACT

(1) The respondent herein, the Great Lakes Dredge and Dock Company, a corporation, on August 8, 1940, and prior thereto, was the owner of the Steamship Michigan and was engaged in transporting cargoes of sand from Indiana Waters to Lincoln Park, in Illinois, over the waters of Lake Michigan, being navigable waters of the United States.

(2) That respondent employed a crew of thirty-four seamen, including the libelant, Daniel O'Donnell, who was a deckhand and member of the crew on said vessel under a contract for wages at Ninety-Five Dollars ($95.00) per month and in addition thereto his keep amounting to One Dollar and Forty Cents ($1.40) per day.

(3) That on August 8, 1940, the plaintiff was directed by his captain in command of said vessel to leave his usual duties and assist temporarily on shore in the repair of a gasket attached to said vessel, and while assisting in said repairs as directed by said captain, he was injured, due to the acts of other employees in removing certain wedges on the gasket, permitting a heavy portion thereof to fall upon him.

[fol. 58] (4) The evidence is uncertain as to the exact period of total incapacity for gainful occupation.

(5) Libelant left the Marine Hospital of his own accord, without being discharged, and thereby refused further medical care afforded him, and that such action on his part prolonged his disability beyond that which was reasonable.

(6) The season of employment terminated in the month of November, 1940.

(7) There is no evidence of any expenditures upon which to base a recovery for care and maintenance.

Upon the above and foregoing findings of fact, the Court states the following

CONCLUSIONS OF LAW

(1) The libelant cannot recover for care and maintenance;

(2) The libelant is entitled to recover wages from the time of the injury until the expiration of the employment contract, a period of two and one-half months, in the sum of $275.00.

Enter:

Charles E. Woodward, Judge.

Dated December 1, 1941.

[fol. 59] IN THE DISTRICT COURT OF THE UNITED STATES

No. 3172

DANIEL O'DONNELL

v.

GREAT LAKES DREDGE & DOCK COMPANY, a Corporation

DECREE—December 1, 1941

This cause having come on to be heard in its regular order on the 5th day of November, A. D. 1941, upon the pleadings and proofs, and having been argued and submitted by the advocates of the respective parties; and the Court after due deliberation having made its findings of fact and conclusions of law, in writing, heretofore filed herein and made a part hereof.

It is therefore ordered that said findings of fact and conclusions of law are hereby adopted as the court's findings of fact and conclusions of law pursuant to the Supreme Court's Admiralty Rule 46½; and it is further

Ordered, adjudged and decreed that the libelant, Daniel O'Donnell, recover of and from the respondent, Great Lakes

Dredge & Dock Company, herein, the sum of $275.00, together with the libelant's costs to be taxed by the Clerk.

Enter:

Charles E. Woodward, Judge.

Dated December 1, 1941.

[fols. 60-62] And thereupon the plaintiff herein having duly objected to the 4th, 5th and 7th findings of fact and to the conclusions of law, it was ordered that said objections be and the same are hereby overruled.

And thereupon, it was ordered, adjudged and decreed that the said Daniel O'Donnell recover of and from the respondent Great Lakes Dredge and Dock Company, a corporation, the sum of Two Hundred Seventy Five Dollars ($275.00), together with the libellant's costs to be taxed by the clerk of this court, to the entry of which order and decree herein the said Daniel O'Donnell by his counsel then and there duly objected.

[fols. 63-64] In the District Court of the United States

[Title omitted]

Order Sustaining Motion to Dismiss as to Count I and Denying Motion as to Counts 2 and 3—September 24, 1941

It is ordered by the Court that motion of defendant to dismiss cause sustained for want of jurisdiction as to Count One and overruled as to Counts two and three.

[fols. 65-67] Findings of fact and conclusions of law omitted. Printed side page 57 ante.

[fols. 68-69] Decree omitted. Printed side page 59 ante.

[fols. 70-71] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF APPEAL—Filed December 23, 1941

Please take notice that Daniel O'Donnell, the plaintiff in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Seventh Circuit, to be held in the court house of said court, in the city of Chicago, from the interlocutory order entered September 24, 1941, dismissing said cause as to the first count of the complaint herein, and from the final order and decree heretofore entered on December 1, 1941, and from each and every part of said decree.

Dated December 11, 1941.

Earl J. Walker, Attorney for Complainant, 30 North LaSalle Street, Randolph-6673, Chicago, Illinois.

To Hoyt King, Clerk. R. S. Quigley, 20 North Wacker Drive, Chicago, Illinois.

Received copy of the above and foregoing Notice of Appeal and copy of Petition, this 11th day of December, A. D. 1941.

B. S. Quigley, Attorney for Defendant.

[fol. 72] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

APPELLANT'S STATEMENT OF POINTS AND PREJUDICIAL ERRORS APPEARING IN THE RECORD OF THE DISTRICT COURT—Filed January 17, 1942

Now comes the appellant and says there was manifest error in the record and proceedings herein, and for cause thereof shows the following several matters:

1. The District Court erred in sustaining the written motion of the defendant to dismiss the suit herein as to the first count of the complaint.

2. The District Court erred in holding that plaintiff could not recover under the first count of the complaint

and under the statutes of the United States therein referred to.

3. The District Court erred in refusing to find the several facts and each of them as requested by the plaintiff, in writing, on the trial.

[fols. 73-74] 4. The District Court erred in failing to hold as the law, the respective conclusions of law and each of them, submitted by plaintiff to the court, in writing, upon the trial.

5. The trial court erred in making the fourth, fifth, sixth and seventh findings of fact, and each of them.

6. The court erred in holding the first and second conclusions of law and each of them.

7. The court erred in failing to find under the evidence that the plaintiff was entitled to maintenance for a period of ten (10) months under the second count of the complaint and include as part thereof the item of One Dollar and Forty Cents ($1.40) per day for his subsistence as well as wages.

8. The findings of the court are contrary to the evidence.

9. The District Court erred in entering judgment upon the erroneous findings of fact and conclusions of law.

10. The finding and judgment of the court is inadequate and insufficient under the evidence.

11. The court erred as to the law applicable to the facts under the evidence herein.

Daniel O'Donnell, Appellant, by Earl J. Walker, Attorney for Appellant.

[fols. 75-79] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—December 22, 1941

Upon reading the petition of Daniel O'Donnell for leave to appeal herein without bond or other security for costs, and it appearing that said plaintiff is a seaman,

It is ordered that an appeal herein by said Daniel O'Donnell to the United States Circuit Court of Appeals of the Seventh Circuit is allowed as prayed for; and that no bond or security for costs on appeal be required of said appellant.

Enter:

Charles E. Woodward, Judge.

Entered December 22, 1941.

[fol. 80] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 81-85] [Caption omitted]

[fols. 86-89] In United States Circuit Court of Appeals

Before Hon. Otto Kerner, Circuit Judge

7929

Daniel O'Donnell, Plaintiff-Appellant,

vs.

Great Lakes Dredge and Dock Company, a Corporation, Defendant-Appellee

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

Order Allowing Appellant to Proceed Without Prepayment of Costs—January 31, 1942

On motion of counsel for appellant, and on consideration of the affidavit of said counsel showing that appellant is a seaman, it is ordered, pursuant to 28 U. S. C. A. 837 and 287 U. S. 278, that appellant may prosecute this appeal without prepayment of Court costs.

It is further ordered that the transcript of the record in this cause may be not printed, that counsel for appellant and for appellee may withdraw the original certified transcript of record for use in the preparation of their briefs, and that four typewritten copies of appellant's brief, together with proof of service of same upon opposing counsel, may be filed in lieu of the printed copies required by the rules of this Court.

[fol. 90] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1941—APRIL SESSION, 1942

No. 7929

DANIEL O'DONNELL, Plaintiff-Appellant,

vs.

GREAT LAKES DREDGE AND DOCK COMPANY, a Corporation, Defendant-Appellee

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

OPINION—May 22, 1942

Before Sparks and Kerner, Circuit Judges, and Campbell, District Judge

KERNER, Circuit Judge:

Appellant was employed as a deckhand upon the steamship "Michigan," owned and operated by the defendant. He sued for damages for injuries occasioned by the negligence of the defendant and in admiralty for maintenance during his disability. The District Court dismissed the suit as to the negligence count and entered a judgment upon the admiralty count in favor of the libelant for $275. To reverse the judgment, appellant appeals.

The defendant was engaged in transporting sand from Indiana to Illinois over the navigable waters of Lake Michigan. The sand was unloaded from the hatches of the vessel through a conduit swung over the side and permanently attached to the vessel, the outer end being connected to land pipes by means of a gasket. On August 8, 1940, after the gasket became detached, appellant was ordered by the master of the vessel to assist on shore in its repair, and while so engaged, a counter-weight fell upon his leg and pinned it to the floor.

[fol. 91] The errors complained of are in the dismissal of the first count and in making an insufficient award for maintenance.

Section 33 of the Merchant Marine Act of 1920, 46 U. S. C. A. § 688, generally known as the Jones Act, provides

that any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and that in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply.

Appellant earnestly contends that the Jones Act applies the Employers' Liability Act[1] to all injuries incurred by a seaman "in the course of his employment" either on navigable waters or on land, if any part of his duties are in "furtherance of interstate commerce" or "directly or closely and substantially affect such commerce" or if the injury is within the admiralty jurisdiction.

It is interesting to note that the appellant concedes that there are decisions to the effect that admiralty jurisdiction applies only to navigable waters. These, however, he criticizes as unsound, and he argues that the term "seaman," as used in the Jones Act, ought not to be construed to apply to those performing duties only on the vessel. Rather, it should be construed to apply to any seaman who suffers a personal injury in the course of his employment, irrespective of the place of injury.

The criticism heaped upon the decisions is, that if the seaman engaged in duty on a vessel is entitled to recover under the Jones Act, but is denied recovery if, under orders of the master of the vessel, he performs similar duties on shore and is injured, there is read into the statute language that is not there. Unfortunately, we are not free to agree with this contention.

Crowell v. *Benson*, 285 U. S. 22, did not involve the Jones Act, but it arose under the provisions of the Longshoremen's and Harbor Workers' Compensation Act,[2] and in discussing the authority of Congress concerning the grant of power in cases of admiralty and maritime jurisdiction, Mr. Chief Justice Hughes said (p. 55): "In amending and [fol. 92] revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the Act relates occur upon the navigable

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[1] 45 U. S. C. A. §§ 51-59.

[2] Act of March 4, 1927, 33 U. S. C. A. §§ 901-950.

waters of the United States, they fall outside that jurisdiction." (p. 56): "* * * if the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault upon his part, to the liability which the statute creates."

In *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, the court, in discussing the Jones Act, said (p. 388): "Rightly understood the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified, and not between that law and some nonmaritime system."

In *Soper* v. *Hammond Lumber Company*, 4 F. (2) 872, the plaintiff was employed as a seaman on a ship engaged in interstate commerce, and was injured while on shore unloading the vessel. There, as here, he contended he was entitled to proceed in admiralty under the provisions of the Employers Liability Act. The court held to the contrary. In *O'Brien* v. *Calmar etc.*, 104 F. (2) 148, the seaman was injured on a pier while adjusting a gang plank to connect with the defendant's vessel lying at the pier. The court held that the Act has been construed not to extend beyond admiralty jurisdiction, and not to apply to injuries on land. See also *Todahl* v. *Sudden & Christenson*, 5 F. (2) 462; *Esteves* v. *Lykes Bros. etc.*, 74 F. (2) 364; and *Jeffers* v. *Foundation Co.*, 85 F. (2) 24. These cases impel us to the conclusion that the decision of the District Court dismissing the first count of the complaint was correct.

This brings us to the contention that the court made an inadequate award.

The record discloses that immediately after the injury, the injured seaman was removed to a hospital and there treated until August 27, 1940, when he was discharged at [fol. 93] his own request and taken to his home. The court found as a fact that the appellant had been engaged in seasonal work under a contract for wages at $95 per month and his board and lodging valued at $1.40 per day and that the

season began in March and ended in November, and concluded that the appellant was not entitled to maintenance, but awarded to appellant a sum equal to the amount he would have earned under the unexpired term of his contract at the rate of $95 per month. The argument is that appellant should recover, in addition to his wages, his maintenance at the rate of $1.40 per day.

Unquestionably, the owner of a vessel is liable to a seaman injured in the service of his ship, for wages and keep during the employment, *Calmar etc.* v. *Taylor*, 303 U. S. 525; *Smith* v. *Lykes etc.*, 105 F. (2) 604, comparable to that to which the seaman is entitled while at sea, *The Henry B. Fiske*, 141 F. 188; *The Mars*, 145 F. 446; 149 F. 729, and his right to maintenance may extend beyond the term of service, *Calmar* case, *supra*, 529.

Under the circumstances here appearing, we are of the opinion that appellant was entitled to recover his wages at the rate of $95 per month, including his maintenance at the rate of $1.40 per day. Accordingly, the judgment is reversed, and the cause is remanded to the District Court with directions to enter a judgment for appellant for such sum as may be proved to be due upon the principles here determined.

Teste:

[fol. 94] In United States Circuit Court of Appeals

7929

Daniel O'Donnell, Plaintiff-Appellant,

vs.

Great Lakes Dredge and Dock Company, Defendant-Appellee

Judgment—May 22, 1942

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, re-

versed, and that this cause be, and the same is hereby, remanded to the District Court with directions to enter a judgment for appellant for such sum as may be due upon the principles determined by the opinion of this Court filed this day.

It is further ordered that in the event that a money judgment is recovered by the plaintiff against the defendant in this cause, then the costs of the plaintiff in this Court, amounting to $36.65, the prepayment of which was waived pursuant to the provisions of the Statutes of the United States (28 U. S. C. A. Section 837) and order entered on January 31, 1942, shall be taxed on the docket and said amount shall be paid by defendant to the Clerk of the U. S. District Court and transmitted by the Clerk of the District Court to the Clerk of this Court, who shall then account for same in his report of earnings.

[fol. 95] In United States Circuit Court of Appeals

[Title omitted]

Order Permitting Withdrawal of Original Record—July 24, 1942

On application of counsel for appellant, it is ordered that the certified transcript of record of proceedings in the District Court of the United States for the Northern District of Illinois, Eastern Division, filed in this Court on January 31, 1942, be transmitted by the Clerk of this Court to the Supreme Court of the United States for use in connections with appellant's petition for writ of certiorari in that Court.

[fol. 96] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 97] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1942

[Title omitted]

STIPULATION OF PORTIONS OF RECORD NOT TO BE PRINTED—
Filed August 1, 1942

The parties to this cause, through their respective attorneys, hereby stipulate to omit from the printed record all matter designated below:

In the District Court of the United States.

Page 3 —Statement of filing of complaint.
Page 11 —Statement of filing of motion by defendant.
Page 13 —Statement of filing of transcript of testimony.
Pages 18-52—Omit all except statement by Mr. D'Isa on page 19.
Page 62 —Statement regarding entry of court order.
Page 64 —Statement regarding entry of findings of fact and conclusions of law.
[fol. 98] Page 67—Statement regarding entry of decree.
Page 69 —Statement regarding filing of notice of appeal.
Page 71 —Statement regarding filing of statement of points.
Page 74 —Statement regarding entry of order.
Pages 76-79—Certificate as to name of appellee and attorney and designation of record.

In the Circuit Court of Appeals:

Omit all except orders and opinion of the Court. This omits the first five pages and the 7th, 8th and 9th pages.

Walter F. Dodd, Attorneys for Petitioner. B. S. Quigley, Ezra L. D'Isa, Attorneys for Respondent.

July 29, 1942.

[fol. 99] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 320

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 320

DANIEL O'DONNELL,

Petitioner,

vs.

GREAT LAKES DREDGE AND DOCK COMPANY,
A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

WALTER F. DODD,
Attorney for Petitioner.

EARL J. WALKER,
Of Counsel.

THE LAKESIDE PRESS, R. R. DONNELLEY & SONS COMPANY, CHICAGO

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PETITION.

BRIEF.

OTHER AUTHORITIES.

TABLE OF STATUTES CITED.

Supreme Court of the United States

No. .....

October Term, A. D. 1942.

DANIEL O'DONNELL,

Petitioner.

vs.

GREAT LAKES DREDGE AND DOCK COMPANY,
A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

The petitioner, Daniel O'Donnell, a seaman, respectfully petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Statement of the Matter Involved.

But one issue is presented to this Court—that as to the application of the Jones Act to a seaman "who shall suffer personal injury in the course of his employment" on the shore. (U. S. Code, Title 46, Sec. 688.) Section 33 of the Merchant Marine Act of 1920, amending section 20 of the Seaman's Act of 1915, usually termed the Jones Act, applies the Federal Employers' Liability Act to any seamen suffering injury "in the course of his employment" and the injury to O'Donnell in this case was "in the

course of his employment" as a seaman, even though on land.

There is no question as to O'Donnell's being a seaman nor as to his injury in the course of his employment as a seaman. And the facts also clearly show that he was engaged in interstate commerce.

The petitioner, Daniel O'Donnell, on and prior to August 8, 1940, was a seaman employed as a deckhand and member of the crew upon the steamship "Michigan," owned and operated by the respondent, Great Lakes Dredge and Dock Company. The District Court found as a fact that the respondent was "engaged in transporting cargoes of sand from Indiana waters to Lincoln Park, Illinois, over waters of Lake Michigan, being navigable waters of the United States" (R. 10). The sand was unloaded from the hatches of the vessel by machinery, through a long conduit or pipe permanently attached to the vessel, which swung over the side of the vessel to a staging above the water while unloading, and the other end of the conduit was connected to land pipes by means of a large, heavy gasket, approximately thirty-six inches in diameter. Prior to the accident, the petitioner had been working upon the vessel as a member of the crew, but on the evening of August 8, 1940, the gasket above referred to, which secured the vessel conduit to the shore pipes, became detached and large quantities of sand and water being unloaded from the vessel shot out from between the ends of the pipes; whereupon the captain of the vessel ordered O'Donnell, the petitioner, to assist others on the shore in an emergency repair of the gasket. While the petitioner was thus engaged in the course of his employment under the directions of the master of the vessel, a large counterweight on the gasket fell upon the petitioner and he thereby sustained personal injuries (R. 3). There is no disagreement as to these facts, the only fact at issue below being that as to the extent of the injuries (R. 7).

The petitioner brought an action against respondent in the United States District Court, basing the first count upon the Jones Act for negligence, and two other counts upon the right to maintenance, cure and wages. Upon motion of respondent to dismiss the cause, the District Court dismissed the cause as to Count I for want of jurisdiction, and overruled as to Counts II and III. Upon Counts II and III, no answer was filed by respondent (R. 7), but evidence was taken as to the amount of disability, and a decree was entered for the sum of $275.

On appeal by petitioner, the United States Circuit Court of Appeals, by judgment entered May 22, 1942, sustained the dismissal of the first count by the District Court; reversed the judgment of that Court under Counts II and III; and ordered the cause remanded with directions to enter a judgment for petitioner upon principles stated by that Court with respect to wages, maintenance and cure (R. 19-20).

Petitioner's right to an admiralty remedy of maintenance and cure was set out in Counts II and III of his complaint (R. 4-5), and was fully recognized by respondent and by the lower courts in the present case; but relief was denied to him under the Jones Act on the ground that admiralty jurisdiction limits that act to injuries on navigable waters.

The judgment of the Circuit Court of Appeals sustaining the dismissal of petitioner's first count for want of jurisdiction is a final decision as to that issue, and denies petitioner any rights to relief under the Jones Act. This is the only issue presented by this petition.

This Court Has Jurisdiction.

This case involves "an important question of federal law, which has not been, but should be, settled by this Court" (Supreme Court Rule 38, par. (5) (b)). This Court has never decided that a seaman injured on land

"in the course of his employment" is denied the remedy accorded by the Jones Act to "any seaman who shall suffer personal injury in the course of his employment." It is true that a mass of decisions of District Courts and Circuit Courts of Appeal have limited the application of this remedy to injuries incurred on navigable waters. And it is further true that this Court, in *Crowell* v. *Benson*, 285 U. S. 22, 55, unnecessarily stated, with respect to a statute specifically limiting itself to injuries on navigable waters, that admiralty and maritime jurisdiction was constitutionally so limited. There are other unnecessary statements by this Court to the same effect. It is because of these decisions and dicta that the Circuit Court of Appeals said in the present case that "unfortunately" they were not free to agree with an opposing view. Such an issue is for determination by this Court.

Statements heretofore made by this Court and by inferior federal courts are not controlling. The Court is here faced with a situation similar to that in *United States* v. *Evans*, 195 U. S. 361, where it disregarded dicta of this Court and a number of decisions of inferior federal courts, and abandoned "the distinction between damage done to fixed and to floating structures", saying, through Mr. Justice Holmes, that "the constitution does not prohibit what convenience and reason demand."

Nor should jurisdiction be denied because there is no final judgment as to the amount of recovery for care, maintenance and wages. There is a final denial of remedy under the Jones Act, and this is the only issue here presented. The dismissal of the first count of the complaint by the District Court and the affirmance of such dismissal by the Circuit Court of Appeals are in a sense interlocutory, in that other features of the case are not disposed of, but there can be no further proceedings under the Jones Act in either of these Courts. This Court has explicit authority to review by certiorari "either before or after

a judgment or decree by such lower Court" (U. S. Code, Title 28, sec. 347); and it has properly allowed the writ of certiorari where to deny it would merely protract litigation. *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117, 121.

The Question Presented.

Congress has power and has exercised the power to authorize the maintenance of an action for damages at law by "any seaman who shall suffer personal injury in the course of his employment", wherever that course of his employment may lead him.

Reasons Relied Upon for Allowance of Writ.

(1) The intent of the act of congress was to apply the Jones Act to injuries to seamen in the course of their employment, irrespective of the place where the injury may have been incurred.

(2) So to construe the act does not transcend the power of congress which may be necessary and proper for carrying into execution the judicial power with respect "to all cases of admiralty and maritime jurisdiction." The constitutional grant of admiralty and maritime jurisdiction to the federal courts does not forbid congressional provision of a remedy both in federal and state courts for seamen injured in the course of their employment, wherever that employment may be. In the present case it is clear that recognized admiralty and maritime jurisdiction extend maintenance and cure to a seaman injured on land in the course of his employment, and it is thus recognized that such jurisdiction applies to a seaman injured on land. The manner in which that recognized jurisdiction may be exercised is within the power of Congress, and there is no constitutional or logical reason why Congress may not provide a further or a different remedy for injuries both on shore and on land.

(3) The Jones Act applies to seamen a statute originally enacted for railroad employees engaged in interstate and foreign commerce. The power exercised as to seamen is equally sustainable under the commerce clause, and the grant of admiralty and maritime jurisdiction to the federal courts cannot be construed or applied as a restriction upon the commerce power of Congress.

Respectfully submitted,

WALTER F. DODD,
Attorney for Petitioner.

EARL J. WALKER,
Of Counsel.

Supreme Court of the United States

No. .....

OCTOBER TERM, A. D. 1942.

DANIEL O'DONNELL,

Petitioner,

vs.

GREAT LAKES DREDGE AND DOCK COMPANY,
A CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 127 Federal Reporter, 2d., 901. The opinion is also printed in full in the record (R. 16-19).

Jurisdiction.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code (U. S. Code, Title 28, sec. 347). The Circuit Court of Appeals has in this case "decided an important question of federal law which has not been, but should be, settled by this Court." (Supreme Court Rule 38 (5) (b).)

Judgment was entered in this case by the United States Circuit Court of Appeals on May 22, 1942 (R. 19).

Statement of the Case.

There are no controverted issues of fact in this case. No answer was filed by respondent, and the facts alleged in the complaint are admitted (R. 7). Count I of the complaint alleged that petitioner O'Donnell had a cause of action under the Jones Act (U. S. Code, Title 46, sec. 688) for an injury incurred on shore while in the course of his employment under the orders and directions of the master of the vessel (R. 1-4). He was at the time a member of the crew of a vessel engaged in transportation of sand on Lake Michigan from Indiana to Illinois, and he was sent ashore to aid in an emergency repair of machinery for unloading in Illinois the cargo brought from Indiana. The motion by respondent to dismiss this count alleges that the Jones Act applies only to cases of injury sustained on navigable water (R. 6). This position was sustained by the courts below (R. 6, 16-18).

Petitioner's right to an admiralty remedy of maintenance and cure was set out in Counts II and III of his complaint, and was fully recognized by respondent and by the lower courts in the present case; but relief was denied to him under the Jones Act on the ground that admiralty jurisdiction limits that act to injuries on navigable waters.

There is no doubt (1) that O'Donnell was a seaman; (2) that at the time of the injury he was "in the course of his employment" as such, as provided by the Jones Act; (3) that at the time of the injury he was performing services as a seaman, under orders of the master of the vessel which he was under duty to obey; and (4) that his duties, and his specific employment at the time of the injury, were in "furtherance of interstate or foreign commerce" and "directly" affected such commerce within the terms of the

Federal Employers' Liability Act. The only issue is that as to whether the Jones Act of 1920, in applying the Federal Employers' Liability Act to seamen, limited this application to injuries on navigable waters, although the act is in terms applicable to all injuries "in the course of his employent", (U. S. Code, Title 46, Sec. 688), and although the act so made applicable to seamen extends to any railroad employee "any part of whose duties as such employee shall be the furtherance of interstate or foreign commeree; or shall, in any way directly or closely and substantially, affect such commerce" (U. S. Code, Title 45, Sec. 51).

Your petitioner takes the position that the Jones Act in terms applies to seamen both on water and on land, while engaged in the course of their employment; that so to construe it avoids serious confusion as to facts in many cases, and as to the nature of the remedy; and that there is full authority in Congress to enact such a statute, both under the commerce power and under the power to enact legislation in amendment of the maritime law.

Errors Relied Upon.

The United States Circuit Court of Appeals erred in holding that the Jones Act applies only to injuries incurred on navigable waters. The Court further erred in basing this view upon the ground that the act is so limited by the scope of admiralty jurisdiction under the constitution; and it further erred in declining to consider the argument that the application of the act to injuries incurred ashore is within the power of congress under the commerce clause of the constitution.

ARGUMENT.

I.

The Jones Act Gives a Remedy to "Any Seaman Who Shall Suffer Injury in the Course of His Employment", Without Any Restriction as to Where the Injury Is Suffered.

Section 33 of the Merchant Marine Act of 1920, otherwise known as the Jones Act, provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representatives of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (U. S. Code, Title 46, Sec. 688.)

This statute applies to seamen "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees". This makes applicable to seamen the Federal Employers' Liability Act (U. S. Code, Title 45, Secs. 51-60). Before its amendment in 1939, the Employers' Liability Act applied only to injuries suffered while the employee was engaged in duties in interstate or foreign commerce. The scope of the act was extended in 1939 to include any employee "any part of whose duties as such employee shall

be the furtherance of interstate or foreign commerce or shall in any way directly or closely and substantially affect such commerce" (U. S. Code, Title 45, Sec. 51). The 1939 amendments to the Federal Employers' Liability Act are applicable to seamen by virtue of the language of the Jones Act. But even if such amendments were not applicable, the services rendered by O'Donnell were services in interstate commerce under the terms of the statute before its amendment in 1939.

In as clear language as is possible, the Jones Act is made applicable to injuries incurred by a seaman "in the course of his employment". There is no limitation as in the Longshoremen's and Harbor Workers' Act which applies "only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock)". U. S. Code, Title 33, Sec. 903. If a limitation to navigable water is present in the Jones Act, it must be found by judicial construction. And in such construction it must be remembered that: "The legislation was remedial, for the benefit and protection of the seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it." *The Arizona* v. *Anelich*, 298 U. S. 110, 123. Seaman are wards of admiralty as to their injuries, wherever incurred.

The Congressional intent appears clear, although it has, to the present, been defeated by judicial construction. The Jones Act, section 33 of the Merchant Marine Act of 1920, was an amendment to section 20 of the Seamen Act of 1915, which moderated the fellow-servant rule as to "any injury sustained on board vessel or in its service". The phrase, "or in its service" clearly included injuries other than those "on board vessel". The amendment of this section through the Jones Act was clearly intended to widen, rather than to narrow, both the remedy and the scope of its application. The broader words "in the course of his employment" replaced the words "on board vessel

or in its service". At the time these words were inserted into the statute, they had received construction in state workmen's compensation statutes. "An injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform." *McNicol's Case*, 215 Mass. 497, 498, 102 N. E. 697 (1913). There is no doubt that a seaman may be required to perform duties on land, for otherwise a stevedore's employees could not have been held to be within the act. And the seaman cannot refuse to perform dangerous services on land, when commanded by the master of the vessel, as in the present case. This Court properly said in *Southern S. S. Co.* v. *National Labor Relations Board*, 62 S. Ct. 886, 890 (1942):

> "The lives of passengers and crew as well as the safety of ship and cargo are entrusted to the master's care. Everyone and everything depend on him. He must command and the crew must obey. Authority cannot be divided."

A similar statement is found in *Johnson* v. *The Cyane*, Fed. Cas. No. 7381.

The phrase "in the course of his employment" applies the act to injuries in the course of such employment, wherever incurred. And the use of the word "seaman" does not restrict the application of the act to navigable waters. Section 713, Title 46 of the United States Code, defines a "seaman" as a person "who shall be employed or engaged to serve in any capacity on board" a vessel. This definition is one intended to distinguish a seaman from a master, and this Court has held that the term "seaman" as used in the Jones Act includes both seaman and master. It has also explicitly held that the definition of seamen in section 713 does not apply to or restrict the Jones Act. *Warner* v. *Goltra*, 293 U. S. 155.

That the term "seaman" as used in the Jones Act is not narrowly construed to apply to those performing duties

only on the vessel is also indicated by decisions holding that a stevedore's employees were subject to the act, although their duties were largely on shore. *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; *Buzynski* v. *Luckenbach S. S. Co.*, 277 U. S. 226.

Section 713 does not limit the term seamen to service aboard a vessel; and, if it did so, a clearly different meaning is shown in the Jones Act. It applies to "any seaman who shall suffer personal injury in the course of his employment".

The language of the Jones Act gives no support to the argument that it is limited to injuries on navigable waters. No such limitation is found in the statute, and, in fact, such a limitation is avoided. To read it into the statute is to engage in judicial legislation. It cannot be said that a seaman ceases to be a seaman "in the course of his employment" when he performs duties on shore in the course of his employment and under orders from the master of his vessel.

But another method has been found to restrict the language of the Jones Act. The statute contains no explicit statement that it applies to a seaman's injuries on land, though it does explicitly apply to all places where he may perform services "in the course of his employment". The remedy of the seaman under the Jones Act is "at his election", and this necessarily implies the existence of another or alternative remedy which may be abandoned. The seaman is permitted to elect this remedy as against any other possible remedy. The remedies (other than maintenance and cure), available to seamen for personal injuries before the passage of the Jones Act were (1) that of unseaworthiness in cases arising in navigable waters and (2) that of suit or compensation under state laws if the injury was not incurred in navigable waters. Under the language of the act, the seaman may choose the remedy under the Jones

Act instead of the alternative federal or state remedy if the injury was suffered "in the course of his employment", either on land or water. Congress is presumed to have known of existing remedies in both federal and state courts, particularly in view of the fact that it was providing a remedy in both courts.

But the controlling view heretofore taken by the courts, is that there was no clear intention to extend jurisdiction to injuries on shore, and that such jurisdiction therefore does not exist under the Jones Act. The first statement of this view, and that subsequently regarded as controlling by other courts, is in *Hughes* v. *Alaska S. S. Co.*, (District Court W. D. Washington N. D., March 7, 1923), 287 Fed. 427, 428:

> "The use of the expression 'at his election' shows that the remedy granted by Section 33 for a tort is an alternative one to that already possessed by the seaman for his injury—the remedy of care and maintenance and wages to the end of the voyage, where he is injured in the service of the ship and for full indemnity in case the ship was unseaworthy. No intention is shown by Section 33 to include in the new remedy any cases, in so far as territorial jurisdiction is concerned, not covered by the old."

This statement is erroneous in several respects. Maintenance and cure is not an alternative but an additional remedy. *Pacific Steamship Co.* v. *Peterson*, 278 U. S. 130, 139. And maintenance and cure have applied to injuries on shore since the Laws of Wisbuy. Mr. Justice Story in *Reed* v. *Canfield*, 1 Sumn., 195 (1832), 20 Fed. Cas. 427 (No. 11,641); Mr. Justice Brown in *The Osceola*, 189 U. S. 158; *Benedict's American Admiralty*, 6th Ed., sec. 27, page 61. If maintenance and cure were an alternative remedy, this would convincingly show a jurisdiction extending beyond navigable waters, and it does establish that the constitutional grant of admiralty jurisdiction extends beyond such waters in the care of seamen. Moreover, the *Hughes*

case completely disregards the fact that the election of remedies provided by the Jones Act applies to remedies under both federal and state laws.

In *Soper* v. *Hammond Lumber Co.*, 4 Fed. (2d), 872 (1925), the Court said, with respect to the Jones Act:

> "The clear intent and purpose of the section was to give him [the seaman] a right which he did not possess before—namely, an election to pursue a common law remedy if he were injured on board ship * * *. He never was so deprived or so restricted for injuries occurring on shore."

The Court said in the *Soper* case that ambiguous language in remedial legislation is to be construed in the light of the mischief to be cured, and that the mischief was the deprivation of right to trial by jury in maritime cases. But there is no ambiguity here, and the purpose of the Federal Employers' Liability Act was to establish certain new and uniform standards. The Jones Act made the Federal Employers' Liability Act applicable to seamen, and the purpose of that act was to cure the defect of common law defenses. In the *Soper* case, as in the *Hughes* case, there is a complete failure to recognize that a remedy may be sought under the Jones Act as an alternative to a remedy under state law, and that this remedy applies to any injury incurred by a seaman "in the course of his employment". The clear intent of the Jones Act was not only to give a right to a common law remedy and a jury trial, but to give such a remedy in both state and federal courts under more favorable conditions to any seaman who had an alternative remedy in either state or federal courts.

The error in the *Soper* case is in the assumption that if the seaman on navigable waters is given a common law remedy together with the removal of common law defenses, he is on the same basis as the seaman performing the same duties on shore, who, if the Jones Act were not applicable, would be subject to the varying state statutes as to common law defenses or workmen's compensation.

Referring to the *Hughes* case, *Benedict's American Admiralty*, 5th Ed. (1925), Vol. 1, page 32, says as to the Jones Act:

> "The Act of Congress has been held inapplicable to an injury sustained by the seaman while working on a pier, but assuredly the intention of Congress was to annex the remedy to the contract of employment and not to confine it, as if independent of contractual relation, within the bounds of maritime tort, particularly as the remedy is given at law."

But the controlling view is in accord with that of the *Hughes* and *Soper* cases. And some weight has been given to the fact that the Circuit Court of Appeals for the Third Circuit took the position that the Jones Act did not apply to seamen's injuries on land, and that this Court denied certiorari. *O'Brien* v. *Calmer S. S. Corporation*, 104 Fed. (2d), 148; Certiorari denied, 308 U. S. 555. "But, 'The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times'." *United States* v. *Carver*, 260 U. S. 482, quoted in *Atlantic Coast Line R. R. Co.* v. *Powe*, 283 U. S. 401.

The opinions of circuit courts of appeal and of district courts have been unanimous, and have been primarily influenced by implications from this Court that any other view would exceed the admiralty and maritime jurisdiction conferred upon federal courts by the constitution.

II.

The Constitutional Vesting of Admiralty and Maritime Jurisdiction in the Federal Courts Authorizes Congress to Prescribe Remedies for Injuries to a Seaman "in the Course of His Employment", Whether on Land or on Navigable Waters.

The constitutional vesting in federal courts of "all cases of admiralty and maritime jurisdiction" carries with it the

power of Congress to legislate on the same subject. *Ex parte Garnett*, 141 U. S. 1. This includes a power to alter maritime law and to create new remedies which were unknown to that law.

In *Crowell* v. *Benson*, 285 U. S. 22, the Court was dealing with the Longshoremen's and Harbor Workers' Act which is specifically limited to injuries on navigable waters. Mr. Chief Justice Hughes said at page 55:

> "In amending and revising the martime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction."

Cases were cited in support of this statement; and a statement of similar import by Mr. Chief Justice Hughes appears in *Minnie* v. *Port Huron Terminal Co.*, 295 U. S. 647. In neither case were the statements necessary to the decision, and the question whether they correctly state the law is for determination by this Court.

The phrase "admiralty and martime jurisdiction" deals with a field of operation and is not limited to the specific rules or specific methods of relief which may once have been, or which may still continue to be, employed. The field of operation is one of navigation, and the Congress has a continuing authority to alter the rules which are to be applied. Mr. Justice Bradley in *New England Marine Insurance Co.* v. *Dunham*, 11 Wall. 1 (1871) said:

> "This Court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as that of England."

The Court has found it necessary not to adhere to unreasonable and unworkable restrictions upon admiralty jurisdiction. In sustaining a statute conferring jurisdiction to entertain a mortgage foreclosure suit under the Ship Mortgage Act of 1920, Mr. Chief Justice Hughes said in *Detroit Trust Co.* v. *Barlum*, 293 U. S. 21, 52:

> "The authority of the Congress to enact legislation of this nature was not limited by previous decisions as to the extent of the admiralty jurisdiction. We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned, as, for example, they were abandoned in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters. *The Genesee Chief* v. *Fitzhugh*, 12 How. 443, 13 L. ed. 1058, overruling *The Thomas Jefferson*, 10 Wheat. 428, 6 L. ed. 358."

With reference to an issue not dissimilar from that in the present case, Mr. Justice Brown, concurring, said that the Court was properly abandoning "the distinction between damage done to fixed and to floating structures." The opinion of the Court, by Mr. Justice Holmes, disregarded dicta of this Court and a number of decisions of inferior federal courts, saying that "the constitution does not prohibit what convenience and reason demand." *United States* v. *Evans*, 195 U. S. 361.

But here we need no abandonment by this Court of a prior view as to the scope of jurisdiction. Any matter within the scope of maritime regulation is within admiralty and maritime jurisdiction, and seamen in the course of their employment are within that jurisdiction. Injuries to seamen on land in the course of their employment have been within that jurisdiction as to maintenance and cure since the Laws of Wisbuy and it is for Congress to determine whether there shall be other or additional remedies than maintenance and cure, in the exercise of that juris-

diction. The jurisdiction conferred by the constitution extends to the regulation of maritime transactions, and is not limited by the time, manner or place of such transactions, unless such limitation is read into the constitution by this Court. There is no constitutional basis for a contention that maintenance and cure are within admiralty jurisdiction as to injuries on shore, but that Congress has no power to determine the conditions of a concurrent personal injury suit for the same injury.

The constitution grants admiralty and maritime jurisdiction without restrictions; and this grant cannot be construed, with respect to the same injury, to include a remedy arising out of contract, and to deny the power to create or alter a remedy arising out of tort. And even if this grant of jurisdiction could be so construed, the remedy prescribed by Congress through the Jones Act may be treated as contractual, that is, as giving the same type of remedy as maintenance and cure. Benedict's *American Admiralty*, 5th Ed. (1925), Vol. I, page 32, quoted previously in this brief. To deny the power of Congress is not to deny jurisdiction, but is to seek to control the discretion of Congress in enacting laws within a field of its authority.

Congress has power to replace or supplement the existing admiralty remedy of maintenance and cure for injuries sustained both on land and on water. Authority to substitute remedies in admiralty has been definitely recognized by this Court, and the fact that such recognition involved a statute limited to injuries on navigable waters does not limit the scope of recognized power, which is equally broad in the whole field of admiralty and maritime jurisdiction. In *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 256, the Court properly said that "no doubt was entertained of the power of Congress to modify the admiralty law and to provide for the payment by employers of compensation." Such modification may either supplement or enlarge existing remedies, or, as in this case, may, on elec-

tion, replace any existing supplementary remedy under state law. The whole of the injury on land is within admiralty jurisdiction; not merely the maintenance and cure remedy for the injury; and through such jurisdiction an exclusive or supplementary or elective remedy may be provided by federal statute.

There is jurisdiction in admiralty over the person of the seaman "in the course of his employment"; there is jurisdiction over the subject of his injury "in the course of his employment"; and the constitutional scope of admiralty and maritime jurisdiction properly includes all aspects of such injury.

III.

The Grant of Admiralty and Maritime Jurisdiction to the Federal Courts Does Not Restrict the Power of Congress to Regulate Interstate and Foreign Commerce. The Power of Congress to Provide Remedies for Injuries to Seamen Is Not More Restricted Than That With Respect to Railroad Employees.

The granting of admiralty jurisdiction to the federal courts does not constitute a restriction upon the commerce power, although Mr. Chief Justice Taney expressed the view that Congress could not enlarge the jurisdiction to suit the wants of commerce (*Genesee Chief* v. *Fitzhugh*, 12 How. 443), and although this Court spoke more recently of an "exclusive" admiralty and maritime jurisdiction controlling "a car float in navigable waters". *Nogueira* v. *New York, N. H. & H. R. R. Co.*, 281 U. S. 128, 134. The statement in the *Genesee Chief* case was not necessary to the decision, and the *Nogueira* case involved the Longshoremen's and Harbor Workers' Compensation Act which is explicitly limited to navigable waters (including any dry dock), and which was held expressly to replace the Federal Employers' Liability Act by another and exclusive remedy

accorded a railroad employee engaged in maritime employment on navigable waters. The *Nogueira* case impliedly recognizes that there was power under the commerce clause to make the seaman employed on navigable waters as the employee of a railroad carrier subject to the Federal Employers' Liability Act, but at the same time recognizes that this remedy had been withdrawn by the statutory s bstitution of another and exclusive remedy. *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, 213, clearly recognized the power of Congress to apply to vessels the statutory remedies adopted as to railroads in interstate commerce, although construing the word "boats" in the statute as limited "to vessels which may be properly regarded as in substance but part of a railroad's extension or equipment as understood and applied in common practice". Within this definition of boats, the Federal Employers' Liability Act covered seamen employed by railroads, whether injured on land or water, until such operation was restricted by the Longshoremen's and Harbor Workers' Act. See *Erie R. Co.* v. *Jacobus*, 221 Fed. 335; *The Erie Lighter*, 250 Fed. 490. If a statute based upon the commerce power could provide a remedy for seamen employed by railroads and injured on either land or water, certainly the commerce power can be construed to sustain a statute which provides an additional remedy for seamen injured on land as well as on navigable water. No limitation upon such legislation can be found in the admiralty and maritime jurisdiction, but, if there were, the legislation is fully sustainable under the commerce clause. And there is, of necessity, a close interrelation of the commerce clause and of admiralty jurisdiction.

A particular power or authority may be found to exist "upon a just and fair interpretation of the whole constitution". *Julliard* v. *Greenman*, 110 U. S. 421, 448.

The construction of the Jones Act by inferior federal courts is based upon the theory that, because of limitations

upon admiralty jurisdiction, employees in interstate or foreign commerce by navigation cannot be given the same remedies as employees in interstate commerce by railroads, if they are injured on land. A restriction is therefore read into the statute, although it does not in fact exist. This Court has not held, and cannot be expected to hold, that the commerce power is more restricted as to navigation than as to transportation on land.

The power indirectly vested in Congress as an incident to admiralty jurisdiction of the federal courts does not conflict with the directly granted commerce power. The two powers supplement each other. Speaking for the Court with respect to admiralty law, Mr. Justice Bradley properly said in *The Lottawanna*, 21 Wall. 558, 577:

> "It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress, undoubtedly, has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law, and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of the ground covered by the former."

The power of Congress under the Commerce Clause "comprehends navigation within the limits of every state in the union, so far as that navigation may be, in any manner, connected with commerce with foreign nations, or among the several states, or with the Indian tribes". *Gibbons* v. *Ogden*, 9 Wheat. 1, 197.

The scope of federal control of navigation under the commerce clause was recently discussed in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, in which the Court said, at pages 404, 426:

> "The power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the constitution. • • • It was held early in our history that the power to regulate commerce necessarily included power over navi-

gation. * * * Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control."

And in *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 525, the Court said that:

"We have recently recognized that 'flood protection, watershed development, recovery of the cost of improvements through utilization of power are parts of commerce control'. *United States* v. *Appalachian Electric Power Co. supra.* And we now add that the power of flood control extends to the tributaries of navigable streams."

Certainly the power with respect to navigation and over those employed in navigation is no less than that granted with respect to railways and railway employees. The jurisdiction conferred on federal courts in admiralty cases carries with it a power in Congress to amend the admiralty law, but the fact that this power exists independently of the commerce clause does not restrict that clause.

That the commerce power includes a power to regulate remedies for injuries to workmen is fully established by the *Second Employers' Liability Cases*, 223 U. S. 1; that the power extends to "back-shop" workers is established by *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515; and that it extends to all labor relations incident to interstate and foreign commerce is clearly shown in *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation*, 301 U. S. 1, and *United States* v. *Darby*, 312 U. S. 100. That these regulatory powers apply to seamen is indicated in *National Labor Relations Board* v. *Waterman Steamship Corporation*, 309 U. S. 206.

With respect to the application of the Jones Act under the commerce clause, it should be borne in mind that the purpose of the act was to apply to seamen an act already applicable to railway employees, and that the Federal Employers' Liability Act was based on the commerce clause.

It may be urged, however, that the term "seaman" as used in the Jones Act includes persons not properly within the terms of the commerce clause. But the Jones Act applies to seamen all statutes "modifying or extending the common law right or remedy" of railroad employees, and the Federal Employers' Liability Act as amended in 1939 applies the remedy to any employee of a carrier any part of whose duties as such employee shall be "the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce". If a seaman could be found who was not within these provisions, he could be said not to be within the terms thereof, unless it should be held, as it might properly be under the *Darby Case*, that the commerce clause applies to any person or vessel engaged in navigation who or which "may or will be" carrying articles in interstate or foreign commerce. There is a possibility that every vessel upon navigable waters "may" so carry articles.

Conclusion.

An unnecessary and confusing situation is created, both in the construction of a statute and in the remedies of the seaman, if the seaman engaged in duty on a vessel is entitled to recover under this Act, but is denied recovery if, under orders of the master of the vessel, he performs similar duties on shore "in the course of his employment". No such distinction is found in the statute. In fact, such a distinction is avoided, and to read it into the statute is to engage in judicial legislation. It cannot be said that a seaman ceases to be a seaman "in the course of his employment" when he performs duties on shore in the course of his employment and under orders from the master of his vessel.

Uniformity is of the essence of admiralty jurisdiction (*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149); but for

such uniformity the courts have substituted diversity and confusion.

The seaman, and particularly the seaman on non-tidal waters, will often have duties on shore, as well as on the navigable waters. He will often be engaged in the two types of duties on the same day. And in many cases there will be difficulty in determining whether an injury was incurred on the vessel or on land. This problem was faced in *Minnie* v. *Port Huron Terminal Co.*, 295 U. S. 647, and *The Admiral Peoples*, 295 U. S. 649. There was no intent that he should have a different remedy, and a material difference in the amount of possible recovery if injured in the performance of duties on land similar to those on the vessel; or that, in case of doubt as to whether the injury was occasioned on the vessel or on land, he should be required to make his choice, subject to the possibility that a mistake in choice may occasion a delay that will deprive him of any remedy.

The 1939 amendment to the Federal Employers' Liability Act was intended to avoid similar uncertainty and confusion occasioned by the previous provision in that statute limiting it to injuries incurred by a railroad employee "while he is employed by such carrier in such commerce". Under the view of the court this required that the employee at the time of injury be "engaged in interstate transportation or in work so closely related to it as to be practically a part of it". *Chicago & North Western Ry. Co.* v. *Bolle*, 284 U. S. 74. By the amendment of 1939, the employee is not required to show that he was engaged in an interstate commerce transaction at the time of the injury, but the act applies to an employee "any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially affect such commerce". U. S. Code, Title 45, section 51.

The purpose of the 1939 amendment to the Federal Em-

ployers' Liability Act is indicated in Report 661 of the Senate Judiciary Committee in the 1st Session of the 76th Congress (1939). The amendment removes the restriction on place and character of the service being rendered at the time of the injury; and in view of the fact that it is a part of the statute now applicable to seamen, it strengthens the intent which is already clear from the face of the Jones Act that it applies to all injuries incurred by a seaman "in the course of his employment", irrespective of place.

Respectfully submitted,

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EARL J. WALKER,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 320

DANIEL O'DONNELL,

Petitioner,

vs.

GREAT LAKES DREDGE AND DOCK COMPANY,
A CORPORATION,

Respondent.

REPLY BRIEF.

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REPLY BRIEF.

Petitioner's brief fully concedes that decisions of the lower federal courts deny the protection of the Jones Act to seamen injured on land; that dicta of this court have indicated the same view; and that this Court has denied certiorari in such cases, although this constitutes no determination on the merits.

It may be proper, however, to call attention to the fact that *State Industrial Commission* v. *Nordenholt Corporation*, 259 U. S. 263 (1921), relied upon by the respondent as the first decision of this Court under the Jones Act, involved an accident prior to the passage of the Jones Act and makes no reference to that Act.

In the present case the Circuit Court of Appeals found that it must "unfortunately" follow certain decisions of other courts and unnecessary dicta of this Court, but this Court is not in such an unfortunate position.

The present case for the first time presents to this Court the issue as to (1) the construction of the Jones Act, and (2) as to the validity of the act if construed to mean what it says.

The Terms of the Jones Act Apply to Injuries on Land.

Respondent does not and cannot deny that the act seeks to apply itself to the whole course of the seamen's employment, which may be either on navigable waters or on land.

The terms of the act are sufficiently analyzed in pages 10 to 16 of petitioner's brief, submitted with his petition for certiorari. This analysis is not challenged by respondent, except for the allegation that the Jones Act is remedial and applies only to procedural matters, and that jurisdiction of maritime torts is substantive. Respondent's argument appears to be that the extension to a seaman in the course of employment of the "right or remedy" of the Federal Employers' Liability Act extends to him only the procedural and not the substantive rights which are given by that act. This argument is neither material nor relevant, and is clearly negatived by the terms of the Jones Act. In contradiction of its own argument, respondent properly quotes from *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 388 the statement that the Jones Act applies to admiralty "new rules drawn from another system."

In *Arizona v. Anelich*, 298 U. S. 110, 119, this Court said that the Jones Act "brings into the maritime law new rules of liability", but that it did not introduce assumption of risk as a defense. New liabilities are not merely procedural.

The construction of the Jones Act not to apply to injuries on land has been found by the courts, and not in the language of the statute. The issue here is one as to whether this Court must restrict the application of the statute to navigable waters in order to sustain its validity.

Injuries to Seamen on Land Are Within Admiralty Jurisdiction.

It cannot be denied that admiralty law has long accorded a remedy to seamen injured both on land and on navigable waters. Both are within admiralty jurisdiction, and Congress has authority to determine remedies for both. The remedy of unseaworthiness in its nature applies only to injuries on the vessel. It is subject to change, extension or replacement, by act of Congress. *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 256. The remedy of maintenance and cure has long applied both to navigable waters and to the land, and is equally subject to change or extension, or to the provision of a new and additional remedy. The Jones Act provides a remedy for injuries both on land and on water. The remedy so far as it relates to injuries on shore is elective as against the remedy existing under state law, and is available in both state and federal courts.

It is contended that the injury on shore is a tort to which admiralty jurisdiction cannot extend, and which can be governed "only by the law of the locus," which, in Respondent's opinion, means only the law of the state. Under this contention, there is one remedy for the same injury under admiralty jurisdiction, but Congress has no authority to provide a uniform additional remedy for the same injury, which may be employed in substitution for variant state remedies. It is contended that this cannot be done, although the injury itself is within admiralty jurisdiction; the "locus" of the tort is within the territorial jurisdiction of the national government, and to deny power to Congress limits and divides jurisdiction with respect to the same admiralty transaction.

Under Respondents' contention, admiralty jurisdiction extends to seamen on navigable waters, and permits change or extension of remedies by Congress; and admiralty juris-

diction extends to seamen on land, but does not permit a change or extension of remedies by Congress. Admiralty has jurisdiction over the injury through the remedy of maintenance and cure, but Respondent alleges that this will not justify the establishment of jurisdiction as to another remedy for the same injury.

There is no basis for the contention that admiralty jurisdiction cannot be applied to a tort committed on land. In the absence of federal statute, the jurisdiction was in the state courts, and there remains a right to elect the remedy under state law.

There is no question but that the law of the state applies to a tort committed on land if Congress has not provided otherwise, or if the injured seamen elects to proceed under state law rather than under the Jones Act. Where, by such election the common law of the state applies, this Court has properly said in *Beadle* v. *Spencer*, 298 U. S. 124, 129, that "the common law may apply a different rule to an injury similarly inflicted on the wharf to which the vessel is moored". But this does not restrict the power of Congress, which is explicitly recognized in *State Industrial Commission* v. *Nordenholt Corporation*, 259 U. S. 263. That case presented the issue as to whether a state workmen's compensation act was properly applicable to personal injuries received on land. This Court said, at page 276: "There is no pertinent federal statute; and application of the local law will not work material prejudice to any characteristic feature of the general maritime law". The issue is one as to the authority of Congress to prescribe an elective remedy for an injury on land when the injury is by other principles of law recognized as within admiralty jurisdiction. The scope of admiralty jurisdiction as to all remedies for the same injury is not determined by whether the liability is a contractual or a tort liability.

This Court has explicitly held that a tort liability with respect to an injury to property "attached to the realty" is within admiralty jurisdiction. *United States* v. *Evans*, 195 U. S. 361. This defeats the whole argument of Respondent, for it cannot be argued that jurisdiction over torts on land exists for injury to property but not for personal injuries.

Even if admiralty jurisdiction were restricted to contractual liability for injuries incurred on land, the remedy under the Jones Act may be regarded as contractual and was so regarded in *Benedict's American Admiralty*, 5th Ed. (1925) Vol. 1, page 32, quoted at page 16 of petitioner's original brief. The remedy accorded by the Jones Act is limited to the course of the employment, and is as closely related to the contract of employment as are maintenance and cure.

Nor is there any constitutional restriction against substituting a non-tort for a tort liability in admiralty. This Court has said that workmen's compensation does not create a tort. (*Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 157-158), and it has also said that what was a tort liability for unseaworthiness can be replaced in admiralty by workmen's compensation. *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 256.

The respondent contends that where two remedies for the same injury exist in admiralty, the one may be changed or supplemented, but not the other. Petitioner's contention is that all remedies in admiralty can be changed or supplemented by Congress, and that the grant of admiralty jurisdiction vests such powers in Congress. The act of Congress has here merely given an elective and supplemental remedy with respect to an injury clearly recognized in admiralty by virtue of an unchallenged admiralty remedy of maintenance and cure.

The constitutional authority of Congress is not limited

by the fact that state law controlled injuries to seamen on land, other than maintenance and cure, until some change in that law was made by the Seamen's Act of 1915; and a full alternative remedy was provided by the Jones Act in 1920. Congressional power applies to the whole field of "admiralty and maritime jurisdiction," and the authority of Congress is "not limited by previous decisions as to the extent of the admiralty jurisdiction." *Detroit Trust Co.* v. *Barlum*, 293 U. S. 21, 52. Nor is this Court bound by previous decisions as to the scope of admiralty jurisdiction when "convenience and reason demand" the abandonment of a rule no longer applicable. *United States* v. *Evans*, 195 U. S. 361. The position abandoned in the *Evans* case is parallel to that here involved. This Court there abandoned "the rule determining the admiralty cognizance of torts by place", and held a vessel liable for injury to a beacon "attached to the realty". In the present case we have a congressional determination of liability of the vessel with respect to a service rendered for the vessel by a seaman "in the course of his employment."

The Jones Act Is Sustainable Under the Commerce Clause.

The power of Congress to regulate interstate and foreign commerce is, of necessity, closely related to the powers vested in Congress by admiralty and maritime jurisdiction of the federal courts. Dicta of this Court to the contrary are cited in petitioner's brief (page 20), and are relied upon by respondent (page 20). This interrelation is clearly indicated by *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, 213, and *National Labor Relations Board* v. *Waterman Steamship Corporation*, 309 U. S. 206.

Respondent seeks to distinguish the *Jensen* case on the ground that the Federal Employers' Liability Act governs only the boats which are a part of the railroad's equipment. But such boats are equally governed by ad-

miralty rules, and the Federal Employers' Liability Act applies to their seamen, whether on water or on land. And, even though the liability were a tort liability, it has become subject exclusively to a federal act, whether on land or water.

Respondent seeks to distinguish the *Waterman* case on the ground that it does not extend "maritime jurisdiction to torts occurring on shore" and that "in matters *ex delicto* jurisdiction is established by the *lex locus*". The federal act is a part of the *lex loci*, if valid; and may properly be treated as a part of the seaman's contract rather than as a tort; and, if it be treated as a tort, Congress has authority to enact it, if it relates to remedies within admiralty and maritime jurisdiction. It should also be remembered that in *United States* v. *Evans*, 195 U. S. 361, this Court rejected the so-called *lex loci* rule with respect to an admiralty tort.

With respect to the relation between congressional powers arising from admiralty jurisdiction and from the commerce clause it is only necessary to read together the federal statutes dealing with labor generally and with seamen.

Conclusion.

In his original brief (pp. 24-25), petitioner has sufficiently stated the results of the present construction of the Jones Act by lower federal courts. Two seamen injured in the same transaction may have essentially different remedies; and a seaman injured on land in one state may have a remedy entirely different from a seaman injured in another state. The purpose of the Jones Act was to give a common remedy if the seaman should choose to elect it.

The common law remedy under various state laws differs from the remedy under the Jones Act; and the remedy

under the Jones Act presents a more adequate relief than that under a number of the state workmen's compensation statutes. There is therefore an advantage to the injured seaman in giving him this alternative remedy, and in applying it, as the statute provides, to all injuries in "the course of his employment", irrespective of where that course of employment may require him to work.

Respectfully submitted,

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IN THE

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OCTOBER TERM, A. D. 1942

No. 320

DANIEL O'DONNELL,

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vs.

GREAT LAKES DREDGE AND DOCK COMPANY,
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Respondent.

Brief for the Respondent.

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Brief for the Respondent.

STATEMENT OF THE CASE.

This is an admiralty case. Petitioner, a seaman, brought this action against the Respondent alleging injuries sustained, while on shore, in the course of his employment. The action is founded under the provisions of Section 33 of the Merchant Marine Act of June 5, 1920 (U. S. Code, Title 46, Section 688) amending Section 20 of the Seaman's Act of March 4, 1915, also known as the Jones Act. The trial court dismissed Count I of Petitioner's Complaint on the ground that the allegations on the face thereof showed a lack of admiralty jurisdiction. The Circuit Court of Appeals sustained this action on the part of the trial court. The only issue presented here is whether a

seaman, injured on land, may maintain an action under the Jones Act.

The petitioner in his brief on page 8, states that since no answer was filed by the respondent in the trial court, the facts alleged in the Complaint were admitted. Respondent's motion to strike was sustained as to Count I, and therefore no answer to said Count was necessary. The only admission made by the Motion to Strike was the admission generally following such a motion, and only for that purpose. Counts II and III of petitioner's Complaint were claims for wages, maintenance and cure, which arise out of contract, recoverable irrespective of negligence. Respondent was willing that the petitioner recover the wages, maintenance and cure to which he was entitled and therefore the only confest as to that was the nature and extent of injury.

Petitioner takes the position that the Jones Act applies to seamen injured both on the water and on land, completely wiping aside the well established jurisdictional requirements that a tort is governed by the law of the locus. He states that confusion arises where this rule of law is followed.

Errors Relied Upon.

Petitioner urges that error exists because the Circuit Court of Appeals held the Jones Act did not apply to seamen injured on shore, that there was further error in basing its decision on such constitutional limitation, and finally error in refusing to consider that the situation arises under the commerce clause of the Constitution.

These contentions are not tenable. The Jones Act does not apply to seamen injured on land, the jurisdiction in admiralty torts is confined to those occurring on navigable waters, and the Court did consider the commerce argument—adversely to Petitioner.

Jurisdiction.

The jurisdiction of this Court is claimed on the basis that the Circuit Court of Appeals "decided an important question of federal law which has not been, but should be, settled by this Court."

It has been held in numerous decisions of this court that a seaman injured on shore may not maintain an action under the Jones Act. See: *State Industrial Commission* v. *Nordenholt Corporation*, 259 U. S. 263; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375; *Crowell* v. *Benson*, 285 U. S. 22; *Minnie* v. *Port Huron Terminal Co.*, 295 U. S. 647; *Beadle* v. *Spencer*, 298 U. S. 124; two cases involving the same question—*Rudo* v. *A. H. Bull S. S. Co.*, 177 A. 538, certiorari denied 295 U. S. 759; and *O'Brien* v. *Calmar S. S. Corporation*, 104 Fed. (2d) 148, certiorari denied 308 U. S. 555.

The Opinion Below.

The opinion of the Circuit Court of Appeals in this matter is reported in 127 Federal Reporter, 2d. 901. The full text may be found in the record (R. 16-19).

ARGUMENT.

I.

Prior to the Jones Act, a seaman injured through the negligence of his employer had a remedy in admiralty without the right of trial by jury. The Jones Act gave the seaman the right to elect to proceed with a trial by jury.

Petitioner contends that the election provided a seaman in the Jones Act is between the right in tort arising for indemnification as theretofore existing and some State provision or system (Pet. Brief 13). That contention is contrary to the decisions of this Court.

A brief of a seaman's rights upon being injured ought to be considered at this point so as to properly present the whole picture to the Court.

This analysis is nicely put by the court in the case of *Smith* v. *Lykes Brothers—Ripley S. S. Co. Inc.*, 105 Fed. (2d) 604, (C. C. A. 5th Circuit—1939; certiorari denied 308 U. S. 604). At page 606:

> "(a) The right to recover wages, and the expense of maintenance and cure which was an incident to his contract for wages, payable irrespective of negligence unless the injury was brought about by the seaman's wilful misconduct.
>
> "(b) The right, under maritime law, to recover indemnity for injury caused by the unseaworthiness of the vessel, which was predicated upon negligence of the owner.

"(c) The right, under the Merchant Marine Act, *supra*, to recover indemnity for a personal injury suffered in the course of his employment.

* * *

"The three causes of action, (a), (b), and (c), above mentioned arose at the same time but depended upon different facts and distinct principles of law. The Appellant was required to elect between (b) and (c), the tort actions; but no election was required as to (a), wherein the duty of the Appellee arose as an incident to the contract for wages."

The basis for this analysis may be found in *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130. This Court holds that the election required from a seaman under the Jones Act is between recovery for negligence and for unseaworthiness of the vessel. See also *The Arizona* v. *Anelich*, 298 U. S. 110.

In the case of *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, wherein the opinion was rendered by Mr. Justice Van Devanter, it was held that the Jones Act "extends to injured seamen the right to invoke, at their election, either the relief accorded by the old rules or that provided by the maritime law as modified, and not between that law and some non-maritime system."

Petitioner fails to consider the distinction between contract and tort. It is elementary law that the place where the breach of contract occurs is immaterial in so far as substantive rights are concerned. It is likewise elementary law that the place where the tort occurs is very material in determining the substantive rights applicable. Petitioner

suggests that the right of a seaman to recover wages, maintenance and cure has been recognized since the Laws of Wisby, even though the injury occurred on shore. This is correct, because the remedy sought arises from the breach of contract. Nowhere, however, has petitioner pointed out any case wherein relief was afforded under the maritime law because of a tort arising on land.

The *W. H. Hoodless*, 38 Fed. Supp. 432, (Pa. 1941) clearly defines wages, maintenance and cure to arise from the contract of employment independent of any consideration of negligence or culpability, while the right to indemnification or the election to proceed under the Jones Act lies in tort.

II.

The Jones Act does not extend admiralty jurisdiction to cover non-maritime torts. An injury on shore is not within admiralty jurisdiction. Such injury is governed by the law of the locus.

It has long been held in an unbroken chain of authority by our Federal Courts that in order for an injury sustained to invoke admiralty jurisdiction such injury must have occurred on the vessel while on navigable waters. An injury sustained off the vessel is not a maritime injury and therefore does not come under the admiralty law; and, if there is no jurisdiction under the admiralty law, the petitioner's remedy lies under the law of the state having jurisdiction of the *locus*. It is respondent's contention therefore that the law of Illinois prevails and the petitioner's remedy lies under the Workmen's Compensation Act of that State.

The first U. S. Supreme Court decision under Section 33 of the Merchant Marine Act of 1920 was the case of *State Industrial Commission* v. *Nordenholt Corporation*, 259 U. S. 263; October term, 1921. In that case the injured sustained injuries on shore in the course of his employment as a longshoreman while unloading a vessel lying in navigable waters in the State of New York. Action was commenced before the Industrial Commission of that State where an award was allowed, on the theory that the injury occurred under circumstances invoking the jurisdiction of the State of New York and not Admiralty. The Appellate Division of that State reversed the award and the Court of Appeals affirmed that action. On Writ of Certiorari to review, the Supreme Court of the United States reversed and remanded the case, Mr. Justice McReynolds delivering the opinion of the Court. On page 272 of the opinion, the learned judge said:

> "When an employee working on board a vessel in navigable waters sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of the employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied."

This case has become the leading case on the question and has been cited many times by our federal courts in reaching decisions in similar situations.

In the case of *Crowell* v. *Benson*, 285 U. S. 22, at page 55, Mr. Chief Justice Hughes said:

> "In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits

which are inherent in admiralty and maritime jurisdiction. Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction."

That a different rule applies when injury occurs onshore was recognized in Mr. Justice Stone's opinion in the matter of *Beadle* v. *Spencer*, 298 U. S. 124, quotation follows, from page 129:

> "The rules, peculiar to admiralty, of liability for injuries to seamen or others, are applicable when the injury occurs upon a vessel in port as when at sea, although the common law may apply a different rule to an injury similarly inflicted on the wharf to which the vessel is moored."

The Supreme Court denied certiorari (295 U. S. 759) in the case of *Rudo* v. *A. H. Bull S. S. Co.*, 177 A. 538 to the Court of Appeals of the State of Maryland. The facts there were that a seaman was injured on dock unloading bags of coal. The Court held that in the absence from the Jones Act of an expressed or clearly implied design to extend its operation beyond the physical limits which the general maritime law has been applied, there is no sufficient ground for an adjudication assuming such an extension.

The first Federal District Court case is that of *Hughes* v. *Alaska S. S. Company* (District Court, W. D. Washington N. D., March 7, 1923) 287 Fed. 427. Plaintiff was a mess boy on the steamship "Skagaway" of which the defendant was the owner. The first mate ordered plaintiff upon the wharf to assist in unloading, where he was injured. Plaintiff's action was brought at law under Section 33 of the Merchant Marine Act of 1920, amending

Section 20 of the Seaman's Act of 1915. The Court, at page 428, had this to say:

"The question for determination is that of the court's jurisdiction to proceed further in this case under Section 33 of the Merchant Marine Act of 1920 (41 Stat. 4007), the advantage of which plaintiff asks, presumably to avoid meeting the defense that he was injured through the negligence of a fellow servant. The language of Section 33 of the Merchant Marine Act of 1920, amending Section 20 of the Act of March 4, 1915, upon which plaintiff relies, is as follows:

'That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury * * * 41 Stat. p. 1007.'

"The contention is that the use of the expression 'in the course of his employment,' coupled with the fact that a seaman may be required to handle the ship's lines or cargo upon the dock, shows that Congress intended that this court should have jurisdiction over torts resulting in the seaman's injury on shore in such service to the ship.

"In view of the well established principle that the jurisdiction in the admiralty is confined to torts committed or suffered upon the high seas or other navigable waters, such an intention would have to be clearly shown. No such intention on the part of Congress is disclosed by the language used in Section 33."

This decision clearly follows this Court's reiteration of a well-established Admiralty jurisdictional requirement concerning tort liability as stated in the *Nordenholt* case, *supra*.

This decision distinguishes clearly that Section 33 does not create a new cause of action but merely permits the former cause of action to be determined maintaining the same jurisdictional requirements. This case has been cited with approval by many District Courts and Circuit Courts of Appeal of our Federal judiciary.

The next leading case much cited is that of *Todahl* v. *Sudden & Christenson, et al.* (Circuit Court of Appeals, Ninth Circuit. April 20, 1925. Rehearing denied May 11, 1925) 5 Fed. (2d) 462 (pg. 463).

> "One of the questions presented is whether or not the plaintiff was entitled to bring an action under the Merchant Marine Act of 1920. We find no warrant in any provisions of that act for disregarding the prior well-settled rule that admiralty has no jurisdiction over torts committed on land."

After reviewing several cases, including that of *Hughes* v. *Alaska S.S. Company, supra,* the Court reached the conclusion that nowhere in the act is there an expression of the intention of Congress to enlarge the admiralty jurisdiction.

The next case in point is that of *"The Montezuma"* (District Court, W.D. New York. October 29, 1926) 15 Fed. (2d) 580.

> "The trend of all the decisions is that, where the injury was received upon land, then cognizance of the tort cannot be taken in admiralty; but, if it was received on the ship in navigable waters, jurisdiction *in rem* for damages is beyond question."

The Court quotes from several decisions of sister branches of the Federal courts all to the same effect. One concise quotation is found on page 581:

> "In actions which are *ex delicto*, the question whether the tort is maritime or non-maritime does not

depend upon whether or not the person who brings the action was, when he was injured, working under a maritime contract. It depends solely upon the locality of the person injured at the time the wrong was committed. If the wrong takes place on land it is not maritime, and if it takes place on navigable water it is maritime."

This case was reviewed by the Circuit Court of Appeals, Second Circuit, May 2, 1927, 19 Fed. (2d) 355, and was affirmed in so far as the jurisdictional question involved.

The next expression by the Federal judiciary in a similar situation appears in the case of *Kulczyk v. Rockport S. S. Co.* (District Court, E.D. Michigan, N.D., October 16, 1934) 8 Fed. Supp. 336.

Plaintiff's action was at law seeking damages for injuries received while he, a seaman, was engaged in shifting certain cables in an effort to fasten his ship to the dock. The Court, at page 337, said:

"It is, in my opinion, now clearly settled that when a seaman claims to have been injured by the tort of his employer, even though he was engaged in the performance of a maritime contract when so injured, the question whether liability for such tort is to be determined according to the rules of the maritime law or according to the rules of the local law depends upon the question whether the injury was received on navigable water or on land."

And further on:

"Applying this rule to the present case, as the alleged injuries complained of were sustained by the plaintiff while he was standing upon a dock on land and not upon a vessel, or elsewhere on any navigable water, it is manifest that the alleged tort in question was a non-maritime tort, and therefore not subject to

the jurisdiction of admiralty nor subject to the rules of the maritime law. It follows, from elementary principles of l[illegible], that the rights and liabilities of the parties herein are governed by the applicable law of Ohio, including the statute already mentioned." (Said statute being the Ohio Compensation Act.)

A very unusual case, but expressing the same viewpoint is the case of *Esteves* v. *Lykes Bros. S. S. Co., Inc.*, Circuit Court of Appeals, Fifth Circuit. December 18, 1934, 74 Fed. (2d) 364 (pg. 365).

"We agree with the District Court that Section 33 of the Merchant Marine Act does not apply. That section was enacted under the powers given the United States by the Constitution over maritime matters and ought not to apply beyond the well-understood limits of admiralty jurisdiction. It relates wholly to personal injuries, and it is fully settled that such injuries which are inflicted on shipboard are under admiralty jurisdiction, but those occurring on land, though to maritime employees and at the ship's side, are under the law of the land."

In the case of *Jeffers* v. *Foundation Co.*, Circuit Court of Appeals, Second Circuit, July 13, 1936, 85 Fed. (2d) 24. Appeal from the District Court of the U. S. for the Southern District of New York where a judgment dismissed plaintiff's complaint at close of plaintiff's case. In affirming that action, the Court said at page 24:

"The question upon which this case turns is whether the plaintiff may recover under the Jones Act (Section 688, title 46, U. S. Code, 46 U. S. C. A. S. 688), or whether he is confined to the Pennsylvania Workmen's Compensation Act."

The facts were that plaintiff was a diver, working on the foundation for a pier of a bridge being erected across the

Ohio river at Pittsburgh. While there a negligent fellow workman prematurely fired a charge of dynamite and caused plaintiff's injuries. The Court ruled that the Jones Act is confined to navigable waters and further said, at page 25:

> "Therefore even though plaintiff be a 'seaman,' a question which we need not answer, he cannot recover unless he was within those waters."

A recent expression on this situation is the case of *O'Brien* v. *Calmer S.S. Corporation*, the Circuit Court of Appeals, Third Circuit, May 16, 1939, 104 Fed. (2d) 148. Plaintiff, a seaman, slipped on a piece of iron which was lying in the gravel on the pier. He brought action under Section 33 of the Merchant Marine Act of 1920, otherwise known as the Jones Act. The trial court dismissed the action and on appeal the opinion was delivered by Judge Biddle who had this to say:

> "The Jones Act provides that a seaman may recover for personal injuries suffered 'in the course of his employment * * *' with the right of trial by jury.' The act has been construed not to extend beyond admiralty jurisdiction, and not to apply to injuries on land. *Hughes* v. *Alaska S.S. Co.*, D. C., 287 F. 427; *Esteves* v. *Lykes Bros. S.S. Co.*, 5 Cir., 74 F. 2d 364, certiorari denied 295 U. S. 751, 55 S. Ct. 830, 79 L. Ed. 1695; *Todahl* v. *Sudden & Christenson*, 9 Circ., 5 F. 2d 462. The trial court was without jurisdiction to entertain the suit. The Workmen's Compensation Law of Pennsylvania, 77 P. S. Pa. 1 *et seq.*, presumably applied. *Lawton* v. *Diamond Coal & Coke Co.*, 272 Pa. 74, 115A. 886; *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013."

The U. S. Supreme Court denied writ of certiorari at the October term of 1939, 308 U. S. 555.

The following cases hold likewise that an injury on land is not within the Jones Act. *Lindh* v. *Booth Fisheries Co.*, 2 Fed. Supp. 19, (Washington—1932), seaman fell from dock; *Seifort* v. *Keausburg Steamboat Co.*, 20 Fed. Supp. 542 (N.Y.—1937), seaman injured while assisting in the docking of the ship; *Nixon* v. *Raymond City Coal and Transp. Co.*, 280 Ky. 743, 134 S. W. (2d) 633, (1939), seaman injured on land; *Oliver* v. *Calmar S.S. Co.*, 33 Fed. Supp. 356, (Pa.—1940).

The Court will see that in every case above cited the accidental injury occurred in very close proximity to the vessel, but in each instance, off of it. It is not Respondent's contention that Petitioner in this case ought to be remediless, but that his remedy lies under the law of the State of Illinois. The State of Illinois has set up an Industrial Commission operating under the terms of the Illinois Workmen's Compensation Act, administering prescribed relief in situations such as in the instant case. There is no reason why plaintiff should not seek his remedy thereunder.

The wording in Count I of the complaint, "working *for a few minutes only* on the staging over the side of the vessel," indicates petitioner appreciated the jurisdictional problem with which he was confronted and *ab initio* attempted to evade the question by excusing himself with the statement "*for a few minutes only.*" It is not understandable why he should battle so furiously and go to such lengths as he does to obtain redress when a very simple method and procedure is open to him by way of the Illinois Industrial Commission, before which body respondent would be without defense as to jurisdiction, and otherwise protected.

III.

The Jones Act was remedial legislation. The Federal Employers' Liability Act applies to it only as to procedural matters.

The case of *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748, wherein the opinion was rendered by Mr. Justice Van Devanter, contains the most exhaustive Supreme Court analysis of the application of the Federal Employers Liability Act to the Jones Act. Quotation from this decision:

> "The source from which the new rules are drawn contributes nothing to their force in the field to which they are translated. In that field their strength and operation come altogether from their inclusion in the maritime law."

In the case of *Curtis Bay Towing Co.* v. *Dean*, 199 Atl. 521, after reviewing many cases in point and particularly the *Panama R. R. Co.* v. *Johnson, supra*, the Court had this to say at page 527:

> "The statute is not intended as an encroachment upon the maritime law as it existed prior to its enactment, but has been construed by the Supreme Court of the United States to be a permissible addition to that law of new rules concerning the rights and obligations of seamen and their employers. By the act, injuries to seamen are not withdrawn from the operation of the maritime law, nor are they themselves permitted to do so; but the statute applies to that law new rules drawn from another system, and therefore extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules."

In the case of *Brown* v. *C. D. Mallory & Co.*, 122 Fed. (2d) 98, the Court at page 101, said:

> "The election between alternatives accorded to the injured seaman referred to by Mr. Justice Van Devanter is a choice between the remedies afforded him by the old maritime law and the remedy granted him by the Jones Act within the framework of admiralty law."

The wording of the Jones Act is "and in such action all statutes of the United States modifying or extending the common-law *right* or *remedy* in cases of personal injury to railway employees shall apply"; and conclusively shows that Congress was establishing remedial novelties. Note the use of the words "right or remedy." Further, the benefits intended to be carried by the reference of another system of law were to take from the employer the defenses of assumption of the risk and fellow-servant doctrines, and permit contributory negligence to be urged only in mitigation of damages. All of these are remedial.

A case on almost all fours with the present matter is that of *Soper* v. *Hammond Lumber Company*, 4 Fed. (2d) 872. In that case the plaintiff urged that since the injury to the seaman occurred on land, he was entitled to proceed in admiralty under the provisions of the Federal Employers Liability Act just as Petitioner in this case attempts to do. The opinion rendered by the learned judge in that case is concise, well put and fully governs the point made by Petitioner in this case. The decision follows:

> "'This is an action for personal injuries, designated by plaintiff a 'complaint by a seaman under the Railroad Employers' Liability Law, 35 St. 65' (being Comp. St. §§ 8657-8665). The allegations are that plaintiff was employed as able seaman on the Covena,

a ship engaged in interstate commerce, and that while he was engaged in loading the vessel a pipe of lumber on shore fell upon and injured him.

"The action is headed as above described, according to plaintiff's brief, upon the theory that Section 33 of the Merchant Marine Act of 1920 (Comp. St. Ann. Supp. 1923, § 8337a), adopts the railroad liability statute, as to vessels engaged in interstate commerce, no matter where the seaman is injured, provided only it can fairly be said to be within his employment as a seaman. Judge Cushman, in *Hughes v. Alaska S.S. Co.*, (D. C.) 287 F. 427, held directly to the contrary. However, in the latest (5th) edition of Benedict on Admiralty, § 25, the editor critizes Judge Cushman's decision, and argues that Section 33 made the rights of seamen thereunder to depend upon his contract of employment.

"I cannot see it that way at all. Section 33 of the Merchant Marine Act provides that 'any seaman who shall suffer personal injury in the course of his employment' may have his election to proceed at common law. But, if he is injured on shore, even in the course of his employment, he needed no congressional permit to bring an action at common law. The clear intent and purpose of the section was to give him a right which he did not posses before—namely, an election to pursue a common-law remedy if he were injured on board ship. Prior to the enactment of section 33, he had no remedy, except at Admiralty, without a jury, and his recovery (except in the case of unseaworthiness) was restricted to wages, maintenance, and cure.

"It is, of course, elementary that remedial legislation, if at all ambiguous, is to be construed in the light of the mischief to be cured. The mischief here

was the fact that the seaman was deprived of the right of trial by jury for maritime injuries, and restricted in the amount of his recovery. But he never was so deprived or so restricted for injuries occurring on shore. I think, moreover, that *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748, which is cited as being contrary to the *Hughes* Case, is in strict accord with it. At Page 388 (44 S. Ct. 394) occurs the following language:

'Rightly understood the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the maritime law as modified, and not between that law and some nonmaritime system.'

"The question received exhaustive treatment in *Industrial Commission* v. *Nordenholt Co.*, 259 U. S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013. That was error to the Supreme Court of New York, which had held that a stevedore injured on the dock was not entitled to compensation, because his contract was maritime. The Supreme Court of the United States, in reversing the Supreme Court of New York, makes this broad, general distinction:

'When an employee, working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general

maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land.'

"In *Chas. Nelson Co.* v. *Curtis*, 1 F. (2d) 774, the Court of Appeals for this circuit in holding that the owner of a vessel is entitled to limitation of liability as against a seaman's suit under section 33, quotes the above language from *Panama Railroad* v. *Johnson*.

"I am constrained to hold, therefore, that section 33 has no application to an injury received on shore."

In the case of *The Arizona* v. *Anelich*, 298 U. S. 110, at page 119, Mr. Justice Stone had this to say:

"The source from which these rules are drawn defines them but prescribes nothing as to their operation in the field to which they are transferred. 'In that field their strength and operation come altogether from their inclusion in the maritime law' by virtue of the Jones Act. The election for which it provides 'is between the alternatives accorded by the maritime law as modified and not between that law and some non-maritime system.' "

Remedial statutes do not change substantive rights. Jurisdiction of maritime torts is substantive. The Jones Act is remedial. *Arizona* v. *Anelich*, 298 U. S. 110; *Chisholm* v. *Cherokee-Seminole S.S. Corporation*, 36 Fed. Supp. 967, (N.Y.—1940).

An action under the Jones Act is a maritime action and subject to the rules of the law maritime. *Panama R.R. Co.* v. *Johnson*, 264 U. S. 375; *The Arizona* v. *Anelich*, 298 U. S.

110; *Rudo* v. *A. H. Bull S.S. Co.*, 177 A. 538; *Sevin* v. *Inland Waterways Corporation*, 88 Fed. 988; and *Charles Nelson Co.* v. *Curtis*, 1 Fed. (2d) 774.

Petitioner cites *The Arizona* v. *Anelich, supra*, as authority for his contention that the Jones Act was intended to extend the maritime jurisdiction. There appears a quotation at page 11 of his Brief. If the quotation had but continued a further sentence or two it would appear that Mr. Justice Stone went on to say that the Jones Act was "to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part."

IV.

The Jones Act is not an exercise by Congress of its right to regulate commerce. It is an exercise by Congress of the right to prescribe remedies within admiralty law.

The right to prescribe admiralty rules and the commerce power of Congress are two distinct matters. The fact that Congress has acted upon the former does not necessarily raise the presumption that the latter was likewise in contemplation: *Genesee Chief* v. *Fitzhugh*, 12 How. 452, 13 L. Ed. 1062. In speaking of the application of the commerce powers of Congress to the Admiralty jurisdiction of this Court, Mr. Chief Justice Taft in *London Guarantee and Accident Co.* v. *Industrial Accident Commission*, 279 U. S. 109, at page 124, had this to say:

> "They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grant."

This was quoted from Mr. Justice Clifford in *The Belfast*, 7 Wall. 624, 640, 19 L. Ed. 266, 270. Cited also were *Genesee Chief* v. *Fitzhugh, supra*; *Re Garnett*, 141 U. S. 1, 35 L. Ed. 631, 634; *Ex Parte Boyer*, 109 U. S. 629, 632,

27 L. Ed. 1056, 1057; *The Commerce*, (*Commercial Transp. Co.* v. *Fitzhugh*), 1 Black, 574, 578, 17 L. Ed. 107, 109.

Petitioner cites *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, as authority by this Court to extend admiralty jurisdiction over non-maritime torts through the commerce power of Congress. In that case the railroad operated a boat in connection with its business as a common carrier. The injury occurred on board, and the injured man proceeded under the Federal Employers' Liability Act, which provided a remedy to him for negligence of the employer's servants and agents or for negligence in the maintenance and operation of employer's "cars, engines, appliances, machinery, track, roadbed, works, *boats*, wharves, or other equipment." The question arose whether *boats* could properly be included within the scope of the Act. At page 213 the Court, through Mr. Justice McReynolds, said:

> "Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having a direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto. It is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters merely because the ocean-going ship concerned happened to be owned and operated by a company also a common carrier by railroad. The word 'boats' in the statute refers to vessels which may be properly regarded as in substance but part of a railroad's extension or equipment as understood and applied in common practice."

Very definitely the Court refused to extend the commerce provisions to "another kind of carriage recognized as separate and distinct from transportation on land," and

ruled the boat to be equipment of the railroad and for that reason within the commerce provision. Clearly the Courts points out that "it is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters."

Petitioner further cites *National Labor Relations Board v. Waterman Steamship Corporation*, 309 U. S. 206, as further authority by this Court to extend its jurisdiction in admiralty through Congress' powers to regulate commerce. That Congress has power through the commerce clause to regulate an employee's hire, or contract of employment or discharge is well-established. The N. L. R. A. has done this. That this has been held to include seamen has been so held in the *Waterman* case, *supra*. But, this is not an extension of maritime jurisdiction to torts occurring on shore. The regulation and control exercised in the N. L. R. A. is over contracts of hire, bargaining unions and employment in general; in other words, the contract of employment. This Court always has had Admiralty jurisdiction where a seaman's contract of employment has been concerned; *i. e.*, recovery for wages, maintenance and cure. But, not for tort on land. In matters *ex delicto* jurisdiction is established by the *lex locus*.

These two citations are the only ones which would, from Petitioner's brief, indicate any pertinency. It is respectfully submitted that neither of these cases confirms or even intimates an approval of Petitioner's contention that the commerce power of Congress has been used to or even suggests any intent to extend the Admiralty jurisdiction of this Court to non-maritime torts. On the contrary, these two cases bear out Respondent's contention that "it is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters," and that, while the Federal Judiciary has Admiralty jurisdiction of many matters maritime even though the breach

may occur on land, this jurisdiction never has been extended to torts occurring on shore, not even through the commerce powers of Congress.

CONCLUSION.

Petitioner goes to great length to wipe aside decisions specifically limiting the "land-lubber's" act in its application to a mariner's action. He attempts to extend jurisdiction. He states that an unnecessary and confusing situation is created. It is unnecessary and confusing only in so far as this case is concerned because he makes it so. The law is well-defined and if Petitioner would but seek his redress conventionally, much time, effort and money would be saved. Petitioner, with a wave of the pen, terms the myriad of decisions against his position as being mere *dicta* and asks this Court to abandon the view reached after deliberate consideration in so many cases because it works a hardship—on his theory.

Because petitioner's injury occurred on land and not on board ship, the tort was not within maritime jurisdiction and, therefore, the Court was without jurisdiction to entertain an action brought under the Jones Act.

It is respectfully submitted that the trial court did not err in dismissing Count I of plaintiff's Complaint, that the Circuit Court of Appeals was correct in affirming that action.

Because of the record in this case, and because of the law thereto applicable, it is respectfully submitted that the judgment of the Circuit Court of Appeals was correct and should be affirmed.

Respectfully submitted,

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Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 320.—October Term, 1942.

Daniel O'Donnell, Petitioner, *vs.* Great Lakes Dredge and Dock Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 1, 1943.]

Mr. Chief Justice Stone delivered the opinion of the Court.

The question for decision is whether a seaman injured on shore while in the service of his vessel is entitled to recover for his injuries in a suit brought against his employer under the Jones Act. § 33, Merchant Marine Act of 1920, 41 Stat. 1007, 46 U. S. C. § 688.

Petitioner was a deckhand on respondent's vessel "Michigan", engaged in transporting sand from Indiana to Illinois over the navigable waters of Lake Michigan. As her cargo was being discharged through a conduit passing from the hatch and connected at its outer end to a land pipe by means of a gasket, petitioner was ordered by the master to go ashore to assist in repair of the gasket connection. While he was so engaged the alleged negligence of a fellow employee caused a heavy counterweight, used to support the gasket, to fall on petitioner and cause the injuries of which he complains. The district court dismissed the cause of action under the Jones Act and granted an award for wages. The Court of Appeals for the Seventh Circuit modified the judgment, 127 F. 2d 901, by allowing an additional award for maintenance and cure, but held that no recovery could be had under the Jones Act for injury to a seaman not occurring on navigable waters. We granted certiorari, 317 U. S. —, the question being one of importance in the application of the Jones Act.

The Jones Act, so far as presently relevant, provides:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-

law right or remedy in cases of personal injury to railway employees shall apply . . ."

The Act thus made applicable to seamen injured in the course of their employment the provisions of the Federal Employers Liability Act, 45 U. S. C. §§ 51-60, which gives to railroad employees a right of recovery for injuries resulting from the negligence of their employer, its agents or employees. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375; *The Arizona* v. *Anelich*, 298 U. S. 110. The term "seamen" has been interpreted to embrace those employed on a vessel in rendering the services customarily performed by seamen, including stevedores while temporarily engaged in stowing cargo on the vessel. *International Stevedore Co.* v. *Haverty*, 272 U. S. 50; *Buzynski* v. *Luckenbach S. S. Co.*, 277 U. S. 226. There is nothing in the legislative history of the Jones Act to indicate that its words "in the course of his employment" do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters. On the contrary it seems plain that in taking over the principles of recovery already established for railroad employees and extending them in the new admiralty setting (see *The Arizona* v. *Anelich*, *supra*) to any seaman injured "in the course of his employment", Congress, in the absence of any indication of a different purpose, must be taken to have intended to make them applicable so far as the words and the Constitution permit; and to have given to them the full support of all the constitutional power it possessed. Hence the Act allows the recovery sought unless the Constitution forbids it.

The constitutional authority of Congress to provide such a remedy for seamen derives from its authority to regulate commerce, *Second Employers' Liability Cases*, 223 U. S. 1, and its power to make laws which shall be necessary and proper to carry into execution powers vested by the Constitution in the government or any department of it, Article I, § 8, cl. 18, including the judicial power which, by Article III, § 2, extends "to all Cases of admiralty and maritime Jurisdiction". By § 9 of the Judiciary Act of 1789, 1 Stat. 76, 28 U. S. C. § 371 (Third), Congress conferred on the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . ." By the grant of admiralty and maritime jurisdiction in the Judiciary Article, and § 9 of the Judiciary

Act, the national government took over the traditional body of rules, precepts and practices known to lawyers and legislators as the maritime law, so far as the courts invested with admiralty jurisdiction should accept and apply them. *Waring* v. *Clarke*, 5 How. 441, 459; *The Lottawanna*, 21 Wall, 558, 576; *In re Garnett*, 141 U. S. 1, 14; *Detroit Trust Co.* v. *The Barlum*, 293 U. S. 21, 43, and cases cited.

It is true that the jurisdiction in admiralty in cases of tort or collision is in general limited to events occurring on navigable waters, *Waring* v. *Clarke*, *supra*; cf. *The Blackheath*, 195 U. S. 361, and that the maritime law gave to seamen no right to recover compensatory damages for injuries suffered from negligence. *The Osceola*, 189 U. S. 158, 172, 175; *Pacific Co.* v. *Peterson*, 278 U. S. 130, 134. It allowed such recovery if the injury resulted from unseaworthiness of the vessel or her tackle, *The Osceola*, *supra*, 173, 175, and permitted recovery of maintenance and cure, ordinarily measured by wages and the cost of reasonable medical care, if the seaman was injured or disabled in the course of his employment. *The Osceola*, *supra*, 172-75; *The Iroquois*, 194 U. S. 240; *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 527-28.

But it cannot be supposed that the framers of the Constitution contemplated that the maritime law should forever remain unaltered by legislation, *The Lottawanna*, *supra*, 577, or that Congress could never change the status under the maritime law of seamen, who are peculiarly the wards of admiralty, or was powerless to enlarge or modify any remedy afforded to them within the scope of the admiralty jurisdiction. There is nothing in that grant of jurisdiction—which sanctioned our adoption of the system of maritime law—to preclude Congress from modifying or supplementing the rules of that law as experience or changing conditions may require. This is so at least with respect to those matters which traditionally have been within the cognizance of admiralty courts either because they are events occurring on navigable waters, see *Waring* v. *Clarke*, *supra*, or because they are the subject matter of maritime contracts or relate to maritime services. *Insurance Company* v. *Dunham*, 11 Wall. 1, 25.

From the beginning this Court has sustained legislative changes of the maritime law within those limits. See *Waring* v. *Clarke*, *supra*; *The Lottawanna*, *supra*; *Butler* v. *Boston Steamship Co.*,

130 U. S. 527, 555. Congress has both limited the liability of vessels for their torts even though not engaged in interstate commerce, *In re Garnett, supra; Hartford Accident Co. v. Southern Pacific*, 273 U. S. 207, 214, and extended the limitation to claims for damages by vessel to a land structure. Compare *The Plymouth*, 3 Wall 20, and *Cleveland Terminal R. R.* v. *Steamship Co.*, 208 U. S. 316, with *Richardson* v. *Harmon*, 222 U. S. 96, 101, 106. It has altered and extended the maritime law of liens on vessels plying navigable waters. *Detroit Trust Co.* v. *The Barlum, supra*, and cases cited. And the Jones Act itself has given seamen a right of recovery for injury or death, not previously recognized by the maritime law, which has been uniformly sustained by this Court in cases where the injury occurred on navigable waters. *Panama R., R. Co.* v. *Johnson, supra*, 385-87; *The Arizona v. Anelich, supra; Lindgren* v. *United States*, 281 U. S. 38.

As we have said, the maritime law, as recognized in the federal courts, has not in general allowed recovery for personal injuries occurring on land. But there is an important exception to this generalization in the case of maintenance and cure. From its dawn, the maritime law has recognized the seaman's right to maintenance and cure for injuries suffered in the course of his service to his vessel, whether occurring on sea or on land. It is so stated in Article VI of the Laws of Oleron, twelfth century, 30 Fed. Cas. 1174, and in Article XVIII of the Laws of Wisbuy, thirteenth century, *id.* p. 1191. And see Article XXXIX of the Laws of the Hanse Towns, *id.* p. 1200; Articles XI and XII of Title Fourth, Marine Ordinances of Louis XIV, *id.* p. 1209. Such is the accepted rule in this Court, see *The Osceola, supra*, 169, 175; *Calmar Steamship Corp.* v. *Taylor, supra*, 527-28, and it is confirmed by Article 2 of the Shipowners' Liability Convention of 1936, 54 Stat. 1695, proclaimed by the President to be effective as to the United States and its citizens as of October 29, 1939. Article 12 of the Convention provides that it shall not affect any national law ensuring "more favourable conditions than those provided by this Convention." 54 Stat. 1700.

Some of the grounds for recovery of maintenance and cure would, in modern terminology, be classified as torts. But the seaman's right was firmly established in the maritime law long before recognition of the distinction between tort and contract. In its origin, maintenance and cure must be taken as an incident to the status of the seaman in the employment of his ship. See *Cortes*

v. *Baltimore Insular Line*, 287 U. S. 367, 372. That status has from the beginning been peculiarly within the province of the maritime law, see *Calmar Steamship Corp.* v. *Taylor*, *supra*, and upon principles consistently followed by this Court it is subject to the power of Congress to modify the conditions and extent of the remedy afforded by the maritime law to seamen injured while engaged in a maritime service.

The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters. See *Waring* v. *Clarke*, *supra*; *Insurance Co.* v. *Dunham*, *supra*.

It follows that the Jones Act, in extending a right of recovery to the seaman injured while in the service of his vessel by negligence, has done no more than supplement the remedy of maintenance and cure for injuries suffered by the seaman, whether on land or sea, by giving to him the indemnity which the maritime law afforded to a seaman injured in consequence of the unseaworthiness of the vessel or its tackle. *Pacific Co.* v. *Peterson*, *supra*. Since the subject matter, the seaman's right to compensation for injuries received in the course of his employment, is one traditionally cognizable in admiralty, the Jones Act, by enlarging the remedy, did not go beyond modification of substantive rules of the maritime law well within the scope of the admiralty jurisdiction whether the vessel, plying navigable waters, be engaged in interstate commerce or not. Cf. *Jackson* v. *The Magnolia*, 20 How. 296; *The Belfast*, 7 Wall. 624, 640, *et seq*; *The Garnett*, *supra*.

The fact that Congress has provided that suits under the Jones Act may be tried by jury, on the law rather than on the admiralty side of the federal courts, does not militate against the conclusion we have reached. This is but a part of the general power of Congress to prescribe the forum in which federally-created causes of action are to be tried, *Claflin* v. *Houseman*, 93 U. S. 130, 136-42, —a concomitant of the power many times sustained by this Court to direct that causes of action arising under the Jones Act may be tried in the state courts. E. g., *Engel* v. *Davenport*, 271 U. S. 33, 37-38; *Panama R. R.* v. *Vasquez*, 271 U. S. 557; cf. *Garrett* v. *Moore-McCormick Co.*, 317 U. S. —.

We have no occasion to consider or decide here the question whether a longshoreman, temporarily employed in storing cargo on a vessel, if entitled to recover under the Jones Act for injuries sustained while working on the vessel (compare *International Stevedore Co.* v. *Haverty, supra*; with *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 137), could recover for an injury received on shore in the circumstances of this case. Compare *Industrial Commission* v. *Nordenholt Co.*, 259 U. S. 263, with *South Chicago Co.* v. *Bassett*, 309 U. S. 251, 256.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.